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CURRENT EVENTS

MAY MEETING OF BOARD OF GOVERNORS

THE annual spring meeting of the Board of Governors of the Association was held at the Mayflower Hotel in Washington, D. C., on May 13 and 14, with a one hundred per cent attendance. Its sessions were devoted largely to completion of plans for the annual meeting in Philadelphia in September and to consideration of numerous matters of administration.

Approval was given to the action of the board of editors of the AMERICAN BAR ASSOCIATION JOURNAL in electing Urban A. Lavery of Chicago, Illinois, as managing editor to succeed Joseph R. Taylor who resigned several months ago.

The committee of judges appointed to examine the essays submitted in the Ross Bequest competition appeared before the Board and announced the result of their deliberations.

At the request of the Committee on Unauthorized Practice of Law, it was given authority to arrange for a conference group between the American Bar Association and the trust division of the American Bankers' Association.

Many other matters of importance engaged the attention of the Board of Governors during its two days of work.

ROSS PRIZE ESSAY

THE 1940 winner of the $3000 prize established by the will of the late Judge Erskine M. Ross of California under the auspices of the American Bar Association is Professor Thomas Fitzgerald Green, Jr., of the University of Georgia, who has been a member of the Association since 1934 and is a worthy successor of the distinguished lawyers and jurists who have been the recipients of this prize. This year's timely topic for the Ross essays was

"To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?"

The award and check will be formally presented to Professor Green at the annual meeting of the Association, which this year will be held in Philadelphia in September.

The award of the prize for the best essay discussing the topic selected by the Association was voted by the Board of Governors at its meeting in Washington, D. C., on May 13th. The Board of Governors accepted the unanimous choice of the committee selected to read the essay and recommend the winner of the prize. This year's committee on the award was Ex-Judge William L. Ransom, of New York, a former President of the Association; Mr. Justice William O. Douglas, of the Supreme Court of the United States; and Dean Robert S. Stevens, of the Cornell University Law School. The award committee attended before the Board of Governors and reported their recommendation that Essay No. 118 receive the prize. This was voted by the Board, and the sealed envelope which contained the name and address of the winner was then opened. This disclosed that in 1940, as in 1939, the $3000 prize had gone to a professor of law in one of the Southeastern States, whereas a similar succession had lately bestowed the prize on lawyers in the Pacific Northwest.

The award committee reported that, as heretofore, at least several of the submitted essays were valuable contributions to the informed discussion of a subject which is highly important to the public, the profession, and the administration of justice. Thereby is demonstrated again the wisdom and the public spirit of the bequest contained in the will of Judge Ross, a devoted friend of the Association who served with distinction in the United States Circuit Court of Appeals for the Ninth Circuit.

This issue of the JOURNAL contains the winning essay. In accordance with the recent custom, subsequent issues will publish others of the submitted essays which are deemed to constitute particularly useful contributions to the literature and source material of the subject.

THE ROSS PRIZE WINNER

THOMAS FITZGERALD GREEN, JR., was born at Athens, Georgia, in 1903, the son of Judge Thomas F. Green and Hope Linton Green.

He is a graduate of the University of Georgia and of the University of Chicago. From the latter institution he received the degree of Doctor of Jurisprudence.

In 1927 he was admitted to the Bar of Georgia; and he practised law in Athens for two years. Since 1929 he has taught full time in the Law School of the University of Georgia, and has held the rank of Professor of Law since 1932. He has taught also at summer sessions of the law schools of Mercer University and Emory University, and has served as legislative counsel to State officials and to committees of the General Assembly of Georgia. He is the author of articles in several law journals and of an introductory text on Negotiable Instruments.

He is an active member of the Georgia Bar Association, and has been a member of the American Bar Association since 1934. He is a member of the Chi Phi fraternity, the Phi Delta Phi legal fraternity, Phi Beta Kappa, Phi Kappa Phi, and the American Judicature Society. He is a past president of the Athens Rotary Club.

JUSTICE HARLAN F. STONE ON THE VALUE OF JUDICIAL COUNCILS

THE following letter from Mr. Justice Harlan F. Stone, addressed to Henry P. Chandler, Director of the Administrative Office of the United States Courts, was read at a luncheon in Washington on May 15:

"We are approaching the end of the term of our Court. That circumstance, and the necessity which I am under of 'getting to the printer' with opinions, which my brethren are entitled to see and criticise at the earliest possible moment, make it impossible for me to attend the luncheon which you are giving on Wednesday to the representatives of the Judicial Councils.

"This, I greatly regret, because I have long been of the opinion that the creation of local judicial councils and their organization into a national conference are perhaps our most important and promising means of improving the administration of Justice, and I should have prized the opportunity to have had a word with those who are actively engaged in promoting this movement. It was only getting under way in 1924, when I came to Washington, and as shortly afterward I took up my judicial labors I have, to my regret, had little time or opportunity to participate in it.

Value of Study and Comparison

"Most judicial reforms fail, or are disappointing, because they are not based on adequate study of the particular conditions in which they are expected to operate or because they are adopted without adequate comparison with the experience with similar attempts, or finally because they lack the support of the moral force of the community. I know of no better system to overcome these difficulties than that of local councils, capable of making local studies and gaining the moral support of the Bar and public in their communities, and organized into a national conference for the comparative study of local experience.

"To this may now be added a new and, to my mind, a most important factor—the Administrator of the Federal Courts. Under your capable administration I look to see that office become the means of gathering data of judicial experience and administration of the utmost importance to any systematic attempt to improve judicial administration. The initial step which you are now taking to assure the cooperation of your office with local councils and the national conference is the beginning of an alliance of powerful forces for the betterment of law administration in the United States.

"I congratulate you, and send you all good wishes for its future success."

JOINT LUNCHEON OF THE FEDERAL BAR ASSOCIATION AND THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW

THE annual spring luncheon, sponsored by the Federal Bar Association and the Section of International and Comparative Law of the American Bar Association, was held at the Mayflower Hotel, Washington, on May 15. William R. Vallance, chairman of the Section, presided. In addition to the members of these two organizations, members of the American Society of International Law, the American Law Institute, and delegates to the Eighth American Scientific Congress participated. The speakers were Charles A. Beardsley, President of the American Bar Association; Hon. Francis Biddle, Solicitor General of the United States, who spoke on "Law and the Public"; and William Draper Lewis, Director, American Law Institute, who gave an account of "The American Law Institute's Work in the Field of Comparative Law."

CHARLES A. BEARDSLEY
President, American Bar Association

Mr. Beardsley said:

IT IS my privilege to extend the greetings of the American Bar Association to the distinguished representatives here assembled of our sister American Nations, and also to the members of the American Bar who are the hosts on this occasion.

Our presence here testifies to our purpose to live in peace with each and all of the other American Nations, and to strengthen the foundation of civilization in the Western Hemisphere, and, to that end, to improve the law—national and international—and to improve the administration of the law.

The administration of the law—the thing that we customarily refer to as the administration of justice—is one method of settling disputes; it is civilized man's method. There is another method of settling disputes—disputes may be settled by combats, by fights and by wars; this is primitive man's method.

Man's choice between these two methods of settling disputes is largely influenced by his satisfaction, or lack of satisfaction, with the operation of civilized man's method—with the operation of that method of settling disputes, for the successful operation of which we of the legal profession are so largely responsible.

As we meet here today, at a time when a substantial part of the people of what we like to think of as the civilized world have chosen, and are using, primitive

man's method, we dedicate ourselves anew to the task of making civilized man's method so workable and so attractive that the people of this Western Hemisphere will forever choose to use that method, as the sole method of settling disputes, between the peoples of each of our American Nations, and between each and all of those American Nations themselves.

Will we succeed in this undertaking? You and I do not know. But this much we do know: That we can strive eternally to accomplish this end, realizing as we do, in the words of a Grecian philosopher: "In great attempts, it is glorious even to fail."

ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

THE American Society of International Law held its thirty-fourth annual meeting in Washington May 13-15, the date having been postponed from the last week in April to enable the Society to meet during the Eighth American Scientific Congress and to hold joint sessions with Section IX of the Congress, on International Law, Public Law, and Jurisprudence. The Society's meeting was largely attended by members from all parts of the United States and by many of the delegates from Latin American countries to the Scientific Congress. A capacity attendance was present at the opening session on Monday evening, May 13, when Secretary of State Cordell Hull, the President of the Society, delivered his stirring appeal in behalf of law and order in international relations and urged the Society not to be discouraged by present conditions but to continue to work harder than ever before to help to prevent a return to the dark ages of lawlessness and chaos in the world. Secretary Hull's address was broadcast on a nation-wide hookup and later given world-wide publicity by short-wave radio. The establishment of an international trade tribunal as a means of promoting fair trade practices between nations was proposed in an address by Hon. Huston Thompson, former Chairman of the Federal Trade Commission. Following the session of Monday night, many of the officers and members of the Society and distinguished guests attended a delightful smoker tendered to them by Hon. John Pelényi, the Hungarian Minister in Washington.

Papers Read

The Society met on Tuesday morning, May 14, in joint session with Section IX of the American Scientific Congress. "Problems of American Neutrality" was the subject of addresses by Prof. Charles E. Martin of the University of Washington and Lester H. Woolsey, Solicitor of the Department of State during the last World War. Discussion from the floor followed the reading of these papers. It was led by President James P. Baxter of Williams College and Prof. Francis Deák of Columbia University. In the afternoon of the fourteenth, the Society considered the general subject of "Changing Concepts of International Law." Under this heading, Prof. Joseph W. Bingham of Stanford University Law School read a paper on "Maritime Jurisdiction in Time of Peace," the discussion of which was led by Prof. Philip C. Jessup of Columbia University Law School and Prof. Athern P. Daggett of Bowdoin College. Another topic considered under this subject was "Non-recognition of Title by Conquest and Limitations on the Doctrine." The paper on this topic was delivered by Prof. Herbert W. Briggs of Cornell University, and the discussion led by Prof. Norman J. Padelford of the Fletcher School of Law and Diplomacy. In the evening of the fourteenth, there was a panel discussion of four topics under the general subject of "International Law and Organization." Prof. Percy E. Corbett of McGill University, Montreal, dealt with "Conflicting Theories of International Law," Prof. J. Eugene Harley of the University of Southern California with "Post-war International Organization," H. Duncan Hall, formerly of the League of Nations Secretariat, with "Trends in the Pacific Settlement of International Disputes by Diplomatic Procedures," and James O. Murdock of the Bar of the District of Columbia with "Trends in International Judicial Settlement."

Election of Officers

At the business meeting of the Society held on Wednesday morning, May 15, Secretary of State Hull was reëlected President for another year. President William C. Dennis of Earlham College, Senator Elbert D. Thomas of Utah, and Prof. Jesse S. Reeves of the University of Michigan were reëlected Vice Presidents. George A. Finch was reëlected Secretary, and Lester H. Woolsey, Treasurer.

The meeting closed with a banquet at the Carlton Hotel, at which all the meetings were held, on Wednesday evening, with Frederic R. Coudert, of New York, presiding as toastmaster. Secretary of State Cordell Hull was present, and the following speakers delivered very timely and interesting addresses bearing upon prevailing conditions: Right Hon. Richard G. Casey, Australian Minister to the United States; Senator Elbert D. Thomas of Utah; and Dr. William Mather Lewis, President of Lafayette College.

Meeting at the same time in Washington were the

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GEORGE A. FINCH
Secretary, American Society of International Law

American Law Institute and the Section of International and Comparative Law of the American Bar Association. There was an interchange of a number of members of these organizations at their respective meetings and the Latin American delegates to the Eighth American Scientific Congress availed themselves of invitations from the several North American organizations to attend their meetings.

WASHINGTON SYMPOSIUM ON CONSTITUTIONAL LAW

A SYMPOSIUM on recent developments in constitutional law in the United States was conducted in Washington on March 28, 29, and 30, under the joint auspices of George Washington University and the Federal Bar Association.

The general subject for discussion at this symposium was "The New Nationalism and the New Independence of the States." The session on Thursday evening, March 28, was devoted to the powers of the Securities and Exchange Commission, with special relation to the constitutionality of the much advertised "death sentence" provision in the Public Utility Holding Company Act of 1935. The principal speakers were Lawrence Stanley Lesser, supervising attorney on the staff of the Commission, and James Forrester Davision of the law faculty of George Washington University. The panel discussion was conducted by Huston Thompson, former chairman of the Federal Trade Commission, George Maurice Morris, former chairman of the House of Delegates of the American Bar Association, and Moultrie Hitt of the District of Columbia bar.

On Friday evening, March 29, the principal addresses were given by Hon. John Dickinson, former Assistant Attorney General of the United States, and Charles Sager Collier, professor at George Washington University Law School. Mr. Dickinson's subject was, "The Functions of Congress and the Courts in Umpiring the Federal System." Mr. Dickinson centered his discussion upon the novel doctrine advanced by Mr. Justice Black in his dissenting opinion in the case of *McCarroll v. Dixie Greyhound Lines, Inc.*, decided in January, 1940, which maintains the general proposition that a state law relating to federal subjects should be held valid unless in direct conflict with federal legislation. Prof. Collier spoke on a somewhat similar subject under the title, "Shall Courts or State Legislatures Umpire Tax Jurisdiction Disputes?" Prof. Collier reviewed recent leading cases on the constitutional limits of the tax jurisdiction of the several states, and attempted to appraise the value of the conflicting views upon this important subject. The members of the panel on this occasion were Hon. Sherman Minton, Senator from Indiana; Carl McFarland, former Assistant Attorney General of the United States; and Robert N. Miller of the District of Columbia Bar.

On Saturday afternoon the subject for discussion was the great problem of intergovernmental tax immunities. The principal speakers were Prof. Thomas Reed Powell of Harvard University; and Warner Gardner, special assistant to the Attorney General of the United States. The members of the panel on this occasion were Hon. William C. Walsh, Attorney General of Maryland, Paul E. Shorb of the District of Columbia bar, and Oscar Cox, assistant to the general counsel of the United States Treasury Department.

Harris & Ewing

HON. CHARLES E. CLARK
Judge, United States Circuit Court of Appeals, Second Circuit

Erie R. R. v. Tompkins

On Saturday evening, March 30, the general subject for discussion was the noted decision of the Supreme Court in *Erie R. R. v. Tompkins*, 304 U. S. 64. The principal speakers were William L. Frierson, former Solicitor General of the United States, and Hon. Charles E. Clark, of the United States Circuit Court of Appeals for the Second Circuit. The discussion on this occasion was highly instructive to persons interested in the principles that must control when the federal courts have to make a choice of law in cases within the diversity jurisdiction, where no specific federal constitutional questions are involved. Mr. Frierson de-

fended the doctrine announced by the Supreme Court in *Erie R. R. v. Tompkins,* and criticized the earlier decisions leading back to the case of *Swift v. Tyson,* 16 Peters 1, in which the doctrine of federal judicial independence had been emphatically asserted with respect to this branch of federal jurisdiction. Judge Clark pointed out the difficulty of reconciling the decision in *Erie R. R. v. Tompkins* with the principle that federal procedural rules should be followed uniformly throughout the United States in common law cases as well as in equity cases. He showed that the procedural aspect of the new principle that federal courts must conform to the decisions in the state courts would produce much difficulty and diversity of opinion as to the application of the supposedly uniform federal procedural rules, promulgated by the United States Supreme Court in the same term of Court at which the decision in *Erie R. R. v. Tompkins* was announced.

The members of the discussion panel on Saturday evening were Prof. George K. Reiblich of the Law School of the University of Maryland, and Dean Ribble of the Law School of the University of Virginia.

The sessions were uniformly well attended. It is expected that the several addresses will be reprinted in full in the June issue of the *George Washington Law Review.*

PROCEDURAL REFORM IN ADMINISTRATIVE LAW

BY WALTER GELLHORN
Director, Attorney General's Committee on Administrative Procedure

IN THE late winter of 1939 then Attorney General Murphy, upon the President's request that an investigation be made of the "need for procedural reform in the field of administrative law," appointed a committee "to ascertain in a thorough and comprehensive manner" the extent to which criticisms of the administrative procedure of federal agencies were justified and "to suggest improvements if any are found advisable."

The committee, known as the Attorney General's Committee on Administrative Procedure, is under the chairmanship of Dean Acheson, of the District of Columbia Bar, formerly Under Secretary of the Treasury. Its members are Francis Biddle, Solicitor General of the United States and formerly a member of the United States Circuit Court of Appeals for the Third Circuit; Ralph F. Fuchs, professor of law at Washington University and a member of the American Bar Association's Committee on Administrative Law; Lloyd K. Garrison, dean of the University of Wisconsin School of Law; D. Lawrence Groner, Chief Justice of the United States Court of Appeals for the District of Columbia; Henry M. Hart, Jr., professor of law at Harvard University; Carl McFarland, of the District of Columbia Bar and formerly Assistant Attorney General of the United States; James W. Morris, Associate Justice of the United States District Court for the District of Columbia; Harry Shulman, Sterling professor of law at Yale University; E. Blythe Stason, dean of the University of Michigan School of Law; and Arthur T. Vanderbilt, former president of the American Bar Association and of the American Judicature Society.

Study of Administrative Agencies

This Committee, aided by a staff of Department of Justice lawyer-investigators, has engaged in intensive study of the federal administrative agencies which dispose of private interests by adjudication or by rule-making.[1] The reports made to it by its staff have been published by the Committee in furtherance of its expressed desire "first, that the information submitted to it by its investigators shall be public and, second, that all persons desiring to do so shall have full opportunity to criticize and supplement these reports." The first thirteen of the monographs released by the Committee are now available in print, having been published as a Senate Document—Sen. Doc. No. 186, 76th Cong., 3d Sess.[2] The remainder are being distributed by the Committee in mimeographed form, free of charge. That

1. An indication of the scope and methods of the Committee's work appears in a progress report submitted by it to Attorney General Robert H. Jackson on January 31, 1940. The report has been printed in 86 Cong. Rec. 2144 (Feb. 13, 1940).

2. The thirteen parts of this document deal, respectively, with the following: (1) The Walsh-Healey Act (Division of Public Contracts, Department of Labor); (2) The Veterans' Administration; (3) Federal Communications Commission; (4) United States Maritime Commission; (5) Federal Alcohol Administration; (6) Federal Trade Commission; (7) The Administration of the Grain Standards Act (Department of Agriculture); (8) Railroad Retirement Board; (9) Federal Reserve System; (10) Department of Commerce (Bureau of Marine Inspection and Navigation); (11) The Administration of the Packers and Stockyards Act (Department of Agriculture); (12) Post Office Department; and (13) The Federal Control of Banking (Comptroller of the Currency and the Federal Deposit Insurance Corporation).

DEAN ACHESON
Chairman, Attorney General's Committee on Administrative Procedure

the reports have practical value is attested by Mr. Walter F. Dodd, of the American Bar Association's Committee on Administrative Law, who, in reviewing the initial eleven documents released by the Attorney General's Committee, said:[3]

> "These monographs, together with those to be issued, will present for the first time detailed studies of the various federal administrative agencies, with a critical analysis of their procedures. If the monographs to be issued maintain the standard already established, they will lay the basis for distinct improvements in federal administrative procedures. In fact, the impartial investigations of each administrative body will of themselves serve to remedy many of the defects in the procedure of such bodies. . . Within the space here available it is not possible to discuss the eleven monographs that have been published. So far as the present reviewer can determine, they give careful and accurate accounts of the several administrative bodies. . . ."

3. 88 U. of Pa. L. Rev. 764 (April, 1940).

Comments Are Solicited

The Committee solicits comments, criticisms, and suggestions, which may be addressed to it at the Department of Justice, Washington, D.C. In addition, in order to permit free expression to it of information and opinions concerning administrative procedural problems (either those which are peculiar to particular agencies or those which are of a more general nature), the Committee has scheduled public hearings to be held in the United States District Courthouse in Washington, on June 26, 27, and 28 and July 10, 11, and 12.

Details concerning hours and other matters connected with the hearings will be published in the Federal Register, and may be procured from the Committee upon request.

The final conclusions and report of the Committee are expected to be submitted to the Attorney General in the early autumn.

MORE ON CHISHOLM v. GEORGIA

BY OUR WASHINGTON CORRESPONDENT

WE ARE grateful for valued material sent, in response to the historical inquiry suggested in our May issue, by a curator and former President of the Georgia Historical Society. Mr. Archibald B. Lovett, of Savannah, Georgia, in forwarding copies of two of the early newspaper articles for which we had expressed a desire, indicated doubt as to whether they would provide any new information. While they did not supply the answer to the particular historical question we had propounded, that did not detract from their interest as source material of value.

The newspaper to which we had referred, from which Mr. Lovett sent copies of concurrent stories on the *Chisholm Case,* was *The Augusta Chronicle,* issues of April 20, 1793 and of June 15, 1793. He enclosed also two other interesting items from different issues of the *Chronicle.* One was a resolution of the Georgia House of Representatives, passed December 14, 1792, which explained the State's view that the federal Constitution did not grant power to the Supreme Court of the United States to compel the States to answer to any process (which, of course, would be involved in suits by individuals against the States) but that, by this legislature's construction, the Constitution only gave "power to said Supreme Court to hear and determine all causes commenced by a State as plaintiff against a citizen as defendant, or in cases where two States are parties or between the United States and an individual State." It was explained that "the contrary construction" would submit "the territory of the States and the treasury thereof to the distresses or levies of a federal marshal which is totally repugnant to the smallest idea of sovereignty."

The other additional item of historical interest sent was a message, evidently by the Governor of Georgia, published in *The Augusta Chronicle* of November 2, 1793, wherein he ardently requested "most serious attention to the measure of recommending to the legislatures of the several States that they effect a remedy in the premises by an amendment to the Constitution."

Whether a State Might Be Sued

The *Chronicle's* issue of April 20, 1793 (one of the references which had been given us by Mr. Charles Warren and which we passed on to our readers for a little aid in this research) referred to the circumstances of the argument and the decision of the Chisholm case thus: ". . . On Tuesday the 5th instant, the Attorney General proceeded to discuss the interesting question: Whether a State could be sued by one or more individuals of another State? And in an argument of about two hours and a half ably supported the affirmative side of the question. When Mr. Randolph had closed his speech the court after remarking on the importance of the subject now before them and the necessity of obtaining every possible light on it expressed a wish to hear any gentlemen of the bar who might be disposed to take up the gauntlet in opposition to the Attorney General. As no gentlemen, however, were so disposed, the court held the matter under advisement until Monday the 19th instant when in presence of a numerous and respectable audience they severally declared their opinion on the question that had been argued." Then followed a brief but satisfactory description of the several opinions of the five judges, commencing with Judge Iredell, the sole dissenter; following with Judges Blair, Wilson, and Cushing; and closing with the opinion of Chief Justice Jay.

The quick, unfavorable response to this decision throughout the States was shown in the *Chronicle,* issue of June 15, 1793 (the second of the two references which Mr. Lovett found of those we had passed along) in describing action by the legislature of Massachusetts and in a quotation from the *Boston Independent Chronicle,* under the heading: "From a Correspondent," where it was explained that "when the persons in opposition to the acceptance of the new Constitution hinged on the article respecting the power of the judiciary department being so very extensive and alarming as to comprehend even the State itself as a party on an action of debt; this was denied peremptorily by the Federalists as an absurdity in terms. But it is now said that the eloquent and profound reasoning of the Chief Justice has made that to be right which was first doubtful or improper."

Washington Letter

Judicial Confirmations

THE Senate recently confirmed the appointments of Dean Herbert F. Goodrich, of the Law School, University of Pennsylvania, to be Judge of the United States Circuit Court of Appeals for the Third Circuit and of Senator Lewis B. Schwellenbach to be Judge of the United States District Court for the Eastern District of the State of Washington.

Neutrality Laws Unit

This new unit created within the Department of Justice, as the Department states, will have "responsibility for control of all prosecutive action growing out of violations or charges of violations of laws relating to neutrality, foreign enlistments, treason, sedition, espionage, sabotage or kindred offenses. Prosecutions or arrests under such statutes will be authorized only by this unit. . . . The unit will not handle the prosecution of cases itself, but is primarily for purposes of control of Departmental policy and action in cases falling within those classifications."

The mild wave of protest which followed the establishment of this unit—fearing it may have been a step toward undue control of J. Edgar Hoover and his G-men—seems to have receded; or perhaps it has been overpowered by things of more active news interest. A fair view would be that those inclined to be critical have decided to wait and see how the plan works out.

Uniformity of Policy Aimed At

The Department states it believes "that a more expeditious and uniform consideration can be given to cases if they are considered by a unit which is not engaged in active prosecutive work," and that "cases that are determined upon for prosecution will be sent to the United States Attorney or to the Criminal Division for prosecution by a special prosecutor, or by one of the regular staff of department prosecutors, according to the requirements of each case."

It is explained that "the purpose of centralizing control of cases of this character is to assure uniformity of policy throughout the United Sates, which has not been possible when prosecutions are initiated by District Attorneys," and that "this unit will not supersede or overlap the work of the Federal Bureau of Investigation, or the Civil Liberties Unit, but will determine what prosecutive action should be taken in cases investigated by the Federal Bureau of Investigation, and supervise and expedite their prosecution." It is said also that this new unit "on behalf of the Attorney General . . . will maintain active supervision to expedite the progress of cases in all of the districts and maintain active contact with the State, War, Navy and Treasury Departments in matters affecting the neutrality laws."

The Department of Justice states that "some of the statutes involved prescribe only the most general classifications of offenses and it is desirable that standards to govern a prosecutive policy be made uniform, and that each case be scrutinized with reference to both adequate protection of the national interest and the civil rights of individuals involved." And it is said of the new unit that "one of its first tasks will be to compile the statutes and a digest of decisions relating to neutrality, foreign enlistment, sabotage, espionage, sedition, treason, and kindred laws to be made available to all United States Attorneys and Federal law enforcement officers and to maintain a continuous study of proposed legislation or executive policies, as well as measures, proposals and experiences of other democratic countries in these fields."

Where Responsibility Should Be Placed

The Department does not say whether the initial decision as to what cases shall be investigated, and generally when to stop and when to go, will be left with the Director of the F. B. I. in as large a measure as formerly. Another interesting problem might be presented if this effort to establish a uniform policy throughout the country and to prevent prosecutions being "initiated by District Attorneys," should bring into prominence the issue as to whether it generally is better for law enforcement to have the prosecuting officers under the direction and control of a central department, as are the United States Attorneys; or to have the prosecuting attorneys make the important decisions for themselves, on the home grounds, as do most of the prosecuting officers in the States, in their jobs of enforcing the State laws.

Holmes Memorials

Recommendations made by the special committee of Supreme Court Justices, Senators and Representatives are expected to result in use of the funds, left to the United States by the will of Mr. Justice Oliver Wendell Holmes, for two purposes. One would be the establishment of a park near the Supreme Court building. Another would be publication of selections from the writings of Mr. Holmes, including his opinions, the edition probably to be edited by Mr. Justice Felix Frankfurter.

District of Columbia Events

At its recent election of officers, the Federal Bar Association chose as president for the ensuing year Heber H. Rice of the Home Owners Loan Corporation; and as its delegate to the House of Delegates of the American Bar Association William Roy Vallance, of the Department of State.

The reappointment of Miss Fay L. Bentley to another term, six years, as Judge of the Juvenile Court of the District has served as an endorsement of her previous work in this important position. Judge Bentley succeeded in having her court changed from a criminal tribunal to a place where informal hearings are given to children who misbehave. The court's jurisdiction was extended to include cases of young people up to eighteen years of age.

Modernized procedure in the landlord and tenant branch of the Municipal Court of the District of Columbia is given credit for greatly expediting and humanizing the work of this Court. In the month of April, stays of execution were granted in 916 cases, thus relieving much hardship of poor persons sued by their landlords. This was forty per cent more than the number of such stays in recent previous months. In April the landlord and tenant branch of the Court handled 4,429 cases and gave judgment for possession in 3,407 of them.

Through the conciliation service, which is being tried here for the first time in real estate matters, twelve cases were disposed of without trial. Judge Nathan Cayton believes there will be a substantial increase in these settlements as the new technique becomes more widely applied in the landlord and tenant court. A new procedure substitutes simple summonses for the complicated forms previously in use and relieves defendants of the necessity of filing written defenses.

Federal Regulations Codified

It is understood that the printing is completed, or will be in the very near

(*Continued on page* 509)

Philadelphia, a Historic and Modern City

BY JOSEPH JACKSON
Editor, Pennsylvania Architect and Engineer; author of Literary Landmarks of Philadelphia, American Colonial Architect, etc.

"THERE is no Place de Louis Quinze or Carrousel," complained Mrs. Trollope, when writing of Philadelphia in her irritating book, *Domestic Manners of the Americans,* "no Regent Street or Green Park, to make one exclaim 'How beautiful!' all is even, straight, uniform, and uninteresting." But this English woman, a keen observer and a brutally frank critic, was writing of the city as it was in 1830, and her observations concerned only those two square miles then included within its political boundaries. On the other hand, she was charmed with the Fairmount Water Works and the beautiful surrounding garden and admitted their attraction.

The rigidity of the city plan and the rather uniform architecture of the red brick houses which then lined the streets reacted unfavorably upon all the note-taking English travelers who sought only the center of the old city. But Captain Thomas Hamilton, who wrote a book on the Americans in 1833, while not always friendly, did find something to praise in Philadelphia, which he had first characterized as "mediocrity personified." He admitted it to be "a comfortable city, that is [he qualified] the houses average better than in any other with which I am acquainted," and added, "The public buildings are certainly superior to any I have seen in America."

Charles Dickens Thought the City Too Regular

Dickens found the city "handsome, but distractingly regular." He complained that "After walking about it for an hour or two I felt that I would have given the world for a crooked street."

More had been done, however, in the development of architecture in Philadelphia up to the year 1830 than in any other American city. The last hundred years have accomplished wonders for the physical appearance of the city which long was regarded as the capital of the Colonies, and was, in fact, for ten years, in the youth of the Republic, the designated National Capital.

Philadelphians take a just though modest pride in the history of their city, but are more keenly appreciative of the Philadelphia they have seen expand and develop within their own time. This is not now the city of Mrs. Trollope, of Dickens, or even of Thackeray, who described it lovingly as "grave, calm, kind old Philadelphia." It is a very modern place; yet there is pride in the knowledge that despite the replacement of much of the old by modern architecture, the city still contains more literary and historic landmarks than any other in this country.

Landmarks of the City and of the Nation

Some of these landmarks are among the most prized possessions not only of the city but of the nation. They are connected with the birth of the United States and always will be associated with those men of whom Lord Chatham said: "that for solidity of reason, force of sagacity, and wisdom of conclusion under a complication of difficult circumstances, no nation or body of men can stand in preference to the General Congress in Philadelphia."

Carpenters Hall, where the first Continental Congress assembled, Independence Hall, where it adopted the Declaration of Independence and where the Constitution was framed by a convention comprising the most distinguished and able body of men ever gathered in this or any other country, are outstanding monuments of the nation's origin, which Philadelphia exhibits with excusable pride.

Traveling about the city, one may quickly pass in review three centuries represented by buildings, either historically important or interesting from their antiquity. Old Swedes Church, dating from the seventeenth century, may claim attention on both grounds; it is the oldest church building in the city and the chief reminder of the fact that the Swedes were the original settlers. In a tomb in front of the church lie the remains of the first American ornithologist, Alexander Wilson, an example of paradox not unknown in the history of this country, of being a native of another, and American only in his special genius.

Old Civic Buildings

Some of the earliest examples of our indebtedness to classical architecture are found in Philadelphia. Here are preserved the buildings of the first and second Banks of the United States. The extraordinary group of buildings comprising the Independence Hall block forms the largest example of Colonial architecture to be found anywhere. The group is of interest particularly to the bar of the country since it owes its existence to perhaps the most eminent lawyer in the Colonies, Andrew Hamilton. While he did not actually design the old City Hall (now Independence Hall) as was long erroneously believed, he planned this civic center and supervised its construction. He provided also for the buildings erected long after his death which act as supporters for the central structure; the old City Hall to the east and Congress Hall to the west. The latter was designed for the use of the District Court of the Commonwealth of Pennsylvania, but was used by Congress as the Capitol while Philadelphia was the seat of the Federal Government.

Where the Early Courts Sat

All these structures have more than a passing interest for the lawyer because in them the Supreme Court of the United States sat during the ten years that the Federal Government was here. In all three buildings at one time or another, the Federal District Court and the Circuit Court of Appeals sat. The interest of the legal profession centers also in the hall of the Philosophical Society, the oldest scientific body in this country, since it housed the Federal Courts for several years toward the middle of the nineteenth century. The Philosophical Society's headquarters are around the corner from Independence Hall abutting on Independence Square. Benjamin Franklin, the founder of the society and its president until his death, was instrumental in the erection of this building. Its library and museum contain much valuable and historical material, including the Penn Papers, the Franklin Papers, and one of the original drafts of the Declaration of Independence in Jefferson's handwriting.

Beautiful Residences of a Century and a Half Ago

Some of the fine old residences of the eighteenth and early nineteenth centuries are still to be seen in Philadelphia. The home of Judge Joseph Hopkinson, where he wrote the anthem, "Hail Columbia," remains in good condition, though slightly altered. The old building of the Franklin Institute where Judge John Bouvier had his office and where he compiled his still famous Law Dictionary, has been entirely renovated and is now the Atwater Kent Museum, containing a collection of objects illustrative of the city's history. One of the homes of Judge Bouvier also remains, and in splendid condition still stands the mansion of David Paul Brown, a famous orator of his day.

Christ Church, a brilliant example of early American ecclesiastical architecture showing a definite Christopher Wren influence, is admirably preserved. It is a truly historic structure and its place in American history is indicated by the tombs and hatchments both within its walls and in the surrounding yard. All the Colonial Governors of Pennsylvania worshipped there, as did Franklin and Washington. James Wilson, a signer of the Declaration and head of the first law school established in this country—that of the University of Pennsylvania—lies in one of its vaults. This, like other ancient churches in central Philadelphia, is now regarded as historic in character and maintained in repair for sentimental reasons rather than as a place of worship.

Philadelphia Now a Modern City

Shifting in the center of population and the building of the suburbs of the city in adjoining counties has been marked during the last thirty or forty years. So also, the financial district which had its center in the eastern end of the city for more than a century, has moved westward and the present City Hall may be said now to mark its center. Much that was picturesque (and also uncomfortable) has thus been removed; departed like the Quaker aspect of the old city; today Philadelphia is only historically the Quaker City. It is very modern, decidedly progressive, and in the language of the times, streamlined. Yet, fortunately, enough of its historic past survives with the old hospitable spirit, together with some of that calmness and kindliness which impressed the author of "Vanity Fair."

Recently, the Federal Government has built several enormous structures in Philadelphia in keeping with the trend toward modernization and efficiency. The first of these was the new Custom House, a magnificent structure, adding another tower to the city's sky-line. A little later, a new General Post Office was erected, perhaps the most efficient building for this purpose

(*Continued on page* 481)

Old City Hall, Philadelphia
Where the United States Supreme Court Sat and Where the District and Circuit Courts also were held in the early years.

URBAN A. LAVERY
New Managing Editor,
AMERICAN BAR ASSOCIATION JOURNAL

URBAN A. LAVERY, OUR NEW MANAGING EDITOR

AT a meeting held in Washington on May 12th, the Board of Editors of the JOURNAL selected Urban A. Lavery of the Illinois Bar as its Managing Editor, to succeed Joseph R. Taylor, who retired last Fall after long and distinguished service to the JOURNAL and the Association. The Editor-in-Chief and his associates in the Board of Editors feel most fortunate in being able to enlist the services of so experienced and energetic a lawyer and law editor. He will enter upon his duties with the next issue of the JOURNAL.

Mr. Lavery was born in Erie County, Pennsylvania, on January 6, 1885. His father was Ignatius S. Lavery, a native of Erie County, a farmer, banker, and leader in public affairs. His mother was Elizabeth Tracy Lavery, a native of McKean County, Pennsylvania.

He attended the University of Pennsylvania, and received the degrees of B.S. in 1906 and M.A. for post-graduate work in 1907. In college he was active in athletics, rowed on the Varsity crew, and played on the Varsity football team. He taught English in a Philadelphia high school (part time), 1905 to 1907. He attended Columbia University Law School in 1907 and 1908 and the University of Chicago Law School in 1909 and 1910, receiving the degree of J.D. in 1910.

He was admitted to the Illinois Bar in 1910, and later to practice in the Federal Courts and the Supreme Court of the United States. During 1910 and 1911, he was in the office of Gardner, Stern and Anderson, then in the office of the general counsel for the New York Central Lines. In 1913 he became associated with, and later a partner in, the firm of Montgomery, Hart, Smith and Steere, and continued in that connection until 1918, when he entered service in the World War. He was a First Lieutenant in the Gas Service, AEF, and was seriously wounded in action in the Argonne Drive. From 1919 to 1934 he was in the Chicago firm of Gardner and Carton.

Meanwhile, he had been active in civic and professional affairs, and had engaged extensively in public speaking and in writing on legal and literary subjects. He had special experience in election laws, municipal law, and legislative affairs, and built up a growing reputation in those matters, as well as in general practice. He served as legislative draftsman for the Illinois Constitutional Convention, 1919 to 1921; special counsel for the Board of Education, Chicago, 1923 to 1926; attorney for the Chicago Board of Election Commissioners, 1927 to 1930; legislative counsel for the Cook County Board, 1931 to 1934; the attorney member of the NRA Compliance Board, in Chicago, 1933 to 1934; and special tax counsel of the City of Chicago in 1934. Meanwhile, he had taken part in the work of the Chicago Bar Association, and had written extensively for law magazines. Among his articles in the *Illinois Law Review* were—"Boundaries Article in Illinois Constitution," Vol. 16, page 361 (1922); "Revising a Constitution," Vol. 15, page 437 (1921); "Constitutional Convention or Super-Legislature," Vol. 14, page 269 (1919); "Some Tendencies of Social Legislation," Vol. 9, page 24 (1914).

His writings in the difficult fields of legal research and sources, in the AMERICAN BAR ASSOCIATION JOURNAL, include—

June, 1921, May and August, 1922, "The Language of the Law"; April, 1923—"Punctuation in the Law"; October, 1926—"Survey of Legal Education in Illinois"; May, 1939—"Legal Classification in America, 1880-1940"; November, 1939—"A Formula for Finding the Law."

Mr. Lavery has also done the entire editorial work on such books as Smith-Hurd (Illinois) *Annotated Constitution* (1936) and Smith-Hurd (Illinois) *Annotated Tax Laws* (1940). From 1916 to 1928, he was professor of constitutional law in Loyola University Law School, Chicago.

Owing to illness due to overwork, Mr. Lavery felt obliged in 1935 to leave for a time the active practice of the law. After his recovery he engaged in editorial work for the West Publishing Co. at St. Paul. When he resigned from that post in January of 1940, the editor-in-chief of the West Publishing Company referred to him as "undoubtedly one of the ablest legal editors ever to join the staff of this department."

Mr. Lavery became a member of the American Bar Association in 1916, has served on its committees, has attended many of its annual meetings, and enjoys the acquaintance of many members of the Association. He is also a member of the Illinois Bar Association, the Chicago Bar Association, and the Law Club of Chicago.

He was married in 1925 to Grace Donohue, of St. Paul, Minnesota. They have three children, and will return to Chicago to live.

Mr. Lavery will bring to his work the point of view of a practising lawyer who knows by experience all phases of general practice, and also has served the public as counsel for important public bodies. At the same time, he is a legal scholar with experience in law editing. And he is devoted to the spirit, traditions and purposes of the American Bar Association.

AMERICAN LAW INSTITUTE HOLDS EIGHTEENTH ANNUAL MEETING

Chief Justice Hughes Addresses Institute—Statements of Director Lewis and Judge Goodrich—Progress Reported—Work of Restating the Law Will Continue—Projects Past, Present, and to Come—Debates on Evidence and the Treatment of Youthful Offenders—Annual Dinner Is Outstanding Success

THE eighteenth annual meeting of the American Law Institute was held at Washington on May 16, 17, and 18, 1940, under circumstances that gave unusual interest and importance to the proceedings. The capital was full of learned men of all professions, who had come from all parts of the western hemisphere to exchange ideas on scientific subjects, including law and the other social sciences. Several conferences on international law were going on during the week, and few of the speakers felt that they could afford to ignore the intensely practical nature of all discussions of the law of nations, in the world today. Even the great professor, Einstein, spoke a sentence or two of grave concern.

The meeting of the American Law Institute was opened on Thursday morning, May 16, with Hon. George Wharton Pepper of Philadelphia, president of the Institute, in the chair. Seven hundred and sixty persons were registered as in attendance. Just as the meeting began, Chief Justice Hughes entered the room, and the audience rose and greeted him with prolonged applause. Mr. Pepper said:

"Last year the Chief Justice was unable to be with us. He was at that time slightly indisposed and had been advised to save his strength for the elucidation of the Commerce Clause and other matters about which there is less than unanimity.

"In his absence we were favored by the presence of Mr. Justice Butler. Our contact with him then was such a friendly one that when he died each of us felt that a personal loss had been sustained.

"Today we are again fortunate enough to have the Chief Justice at our meeting. I hesitate to characterize the function which on these occasions he so gracefully discharges. It is not altogether priestly, for he is rather careful not to give us absolution for what we have done amiss. It is not prophetic, for he certainly does not commit his Court to a blind acceptance of our conclusions. But after all we need not use black-letter precision in such a case. Suffice it to say that he has proved himself to be a good friend of the Institute, that we feel highly honored by his presence, and that even if he will neither absolve nor prophesy he may at least give us his blessing.

"Gentlemen: the Chief Justice of the United States."

The Chief Justice's address is given in full on the two following pages. The Chief Justice then left the room, and as he went he was again accorded the tribute of long applause.

Mr. Pepper then introduced Director Lewis, extracts from whose report are given on following pages.

On the Youth Correction Authority Act, Director Lewis said:

"The drafting of an administrative act requires those engaged in the task to visualize all the major complex conditions under which the act will operate. It is not possible for one person, or even a group of persons, with essentially the same experience background to grasp all these circumstances in their entirety and interrelation. The instinct of the Council was correct when they took the position that a criminal law administration act, certainly one that dealt with the sentencing and treatment of youth convicted of violations of law, could not be well drawn by judges and lawyers alone, even though they had long experience in the trial of criminal cases. The legal members of our Criminal Justice—Youth group will be the first to admit that such an act only can be drawn adequately by the collaboration of lawyers with experts in the related social sciences and those with practical experience in the operation of our existing system, which is a penal system with incidental and largely unrelated reformatory features. Likewise, the non-legal members of the group are equally frank in recognizing that an act such as the proposed Youth Correction Authority Act, and of course the proposed Youth Court Act, cannot be drawn with any expectation of practical useful operation unless there enters into its framing legal knowledge and experience."

Following Director Lewis, Herbert F. Goodrich, the Institute's Adviser on Professional Relations and the newly appointed Judge of the U. S. Circuit Court of Appeals for the 3rd Circuit, gave his annual report on the Institute's work in the various States and cited figures on the wide extent to which the State and federal courts are relying on the Institute's Restatements in their decisions.

JUDICIAL DINNER

ON Wednesday evening, May fifteenth, the members of the Council (the governing body) of the Institute gave a dinner to the Justices of the Supreme Court of the United States, the Chief Justice of the Supreme Court of each of the various States, and the Senior Circuit Judges of the United States Courts of Appeal. All judges holding any of these three positions are official members of the American Law Institute. All other members of the Institute (whose total membership is 730) are elected members.

ADDRESS OF CHIEF JUSTICE HUGHES

THIS occasion brings up a poignant memory of your last meeting when I was unable to be present and Mr. Justice Butler in his kindly way consented to greet you in my stead. I vividly recall him as he sat by my bedside shortly after the Court rose last June,—the apparent embodiment of vigor, radiating energy and humor as from an inexhaustible reservoir of both. I never saw him again. Stricken soon after with a fatal malady, he was abruptly taken from the place of judicial responsibility which he had filled so long with complete devotion. He was a genial companion, an able, industrious, independent and courageous Judge,—a sturdy upholder of the traditions of the Court and a doughty warrior for his convictions. Next Monday, at the opening of the session of the Court, appropriate tribute will be paid to his memory upon the presentation by the Attorney General of the resolutions adopted by the Bar.

So, the Court suffers its recurring losses, is continually reenforced, and goes on uninterruptedly with its task. Men pass,—the institution survives, with the Nation keenly conscious of the necessity of safeguarding its independence and maintaining its impartial service.

We expect to close the term in the usual way, disposing of all the cases which were ready to be heard. Our docket has somewhat increased, having thus far 36 more cases than those docketed last term. Up to our last session on May 6th we had disposed of 792 cases as against 770 at the same time a year ago. Of course, the greater number of these were petitions for certiorari. We have passed upon 569 of such petitions, about the same number as on last term's corresponding date. It seems that I must once more direct the attention of the Bar to our method of dealing with these applications. Despite what has repeatedly been said, the misunderstanding seems to persist that either a single Justice or a committee of Justices handles these petitions. Let me say again that, save when a Justice happens to be disqualified in a particular case, every Justice passes upon every case, every petition for certiorari or other application submitted to the Court. Further, in granting or refusing petitions for certiorari we do not adhere to the majority rule. Where four Justices vote for certiorari, it is always granted.

It is pleasant to observe that the new Federal Rules of Procedure seem to be working well. The Advisory Committee appointed by the Court, which rendered such efficient service in drafting the rules, was convened in the Fall to consider and report to the Court whether amendments should be recommended at the beginning of the present session of Congress in conformity with the enabling Act. It was the view of the committee, and it was the decided opinion of the Court, that there should be as little tinkering with the rules as possible, that questions of construction could appropriately be dealt with as they arose in practice, and that nothing in the way of extensive amendments or revision should be attempted until demanded by adequate experience. Accordingly, the Court proposed only one amendment. We think it highly important that, while fully recognizing the power of Congress, we should endeavor to establish the tradition that the initiation of amendments should remain with the Court, acting with the expert assistance of judges and members of the Bar. We have had in some of our States distressful examples of the procedural monstrosities which have been produced when this method has been displaced or ignored.

May I express my gratification at the new enterprises you are instituting with respect to the law of evidence and the method of sentencing and dealing with youths convicted of crime. The problems of youthful offenders put in a strong light the need of special care and understanding in the administration of criminal justice, so that we do not make criminals as fast as we try to punish them. The juvenile delinquent, too often the product of civic neglect and of the fostering of nurseries of crime and hostility to law, should be regarded as in the truest sense the ward of the State, the object of its keen solicitude, in order to secure respect for law by strengthening the resources of self-respect and by developing every possible opportunity to convert the youthful offender into an ally of society instead of its permanent enemy. You have entered upon a new undertaking which promises to be of very great value to the community.

With respect to the special problems of the federal administration of civil justice, I think that there have been advances on all fronts. At the meeting of the Judicial Conference of Senior Circuit Judges last September, it appeared that there had been a marked reduction in the arrears of civil cases in the District Courts. Let me say a word as to the new development in the establishment of the Administrative Office of the United States Courts. This office was created, as you know, by an Act which took effect on November 6, 1939. It is not an executive establishment. It does not place judicial administration under executive control. The office is under the direct supervision of the federal courts. It is immediately responsible to the Judicial Conference of Senior Circuit Judges. The Supreme Court appoints its Director and Assistant Director. We were especially fortunate in obtaining the service, as Director, of Henry P. Chandler of Chicago, an able and experienced lawyer, long identified with efforts of the Bar to improve the administration of justice and a leader in progressive civic movements. We also had the good fortune to bring to the work of the office, as Assistant Director, Elmore Whitehurst, who as secretary for many years of the Judiciary Committee of the House of Representatives, had exceptional experience in dealing with the legislative aspect of many judicial problems.

The Administrative Office has two distinct functions. One is to deal with the business affairs of the federal courts, previously handled by the Department of Justice. These embrace budgets, audits of accounts, personnel, and the procurement of facilities and supplies. The other function deals with the appropriate supervision of the work of the courts. Thus we have the two main divisions of the office, (1) the Division of Business Administration, and (2) the Division of Pro-

cedural Studies and Statistics. The chief of this second division is Will Shafroth, who has long enjoyed a high reputation by reason of his careful studies of judicial administration. Through the work of this division we expect real progress in the development of a reasonably adequate system of judicial statistics. The Administrative Office is gradually, with proper care and deliberation, building up its staff which will soon be complete, and, pending its completion, the office has had the benefit of the continued service and wholehearted cooperation of the Department of Justice.

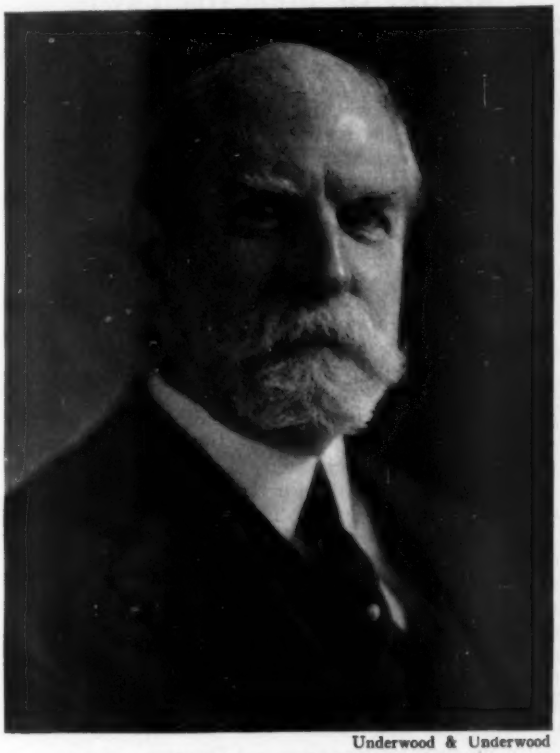
One of the best features of this plan is that it provides for a natural and helpful evolution of the Judicial Conference of Senior Circuit Judges, the responsibility of which is greatly enlarged. Through its power and duty to supervise and direct the Director of the Administrative Office, the Judicial Conference now has the immediate responsibility of looking after the work of the federal courts, other than the Supreme Court,—their needs and their performance of duty. The Senior Circuit Judges know the general conditions in each circuit, and they are now in a position to be informed on all points by the information obtained by the Director of the Administrative Office who thus provides the centralized and executive administration necessary to give coherence and efficiency to the entire scheme.

Another provision of the Administrative Office Act gives the decentralization which is necessary to buttress the sense of local responsibility and to give opportunity for speedy correction of local defects in administration and for consultation as to local problems. This aim is achieved in two ways. First, the statistical data and reports of the business transacted in the courts is transmitted quarterly by the Director to the Senior Circuit Judge of each circuit. All the Circuit Judges in a circuit are constituted a Judicial Council for that circuit, and to that Council the Senior Circuit Judge submits the reports he has received and the recommendations he may wish to make. It is made the duty of the District Judges promptly to carry out the directions of the Council as to the administration of business in their respective courts. Thus, without interfering with judicial prerogatives and proper judicial independence, the Circuit Judges of a circuit are empowered to maintain, and should maintain, a constant supervision of the administration of justice in that circuit and may, and should, see that any necessary steps are taken to correct procedural defects and to expedite the work of the courts.

The second method set up by the Act is found in the provision that there shall be held annually in each circuit a Conference of all the Judges of the circuit, both District Judges and Circuit Judges, with participation by representatives of the Bar if that is desired, for the purpose of considering the state of the business of the courts and devising ways and means of improvement. There is thus to be provided a forum for those best informed as to local difficulties in administration and best qualified by experience to deal with them. Through these judicial conferences in the circuits, undoubtedly matters will be developed for the consideration of the Judicial Conference of Senior Circuit Judges and thus their work of supervising and directing the Administrative Office will be aided by the information and suggestions that will come from the respective local conferences. This plan has rich promise. The courts are now equipped to manage their own affairs and will have the correlative responsibility.

With all these plans, it still remains for the Judge to do his work. The able, experienced and conscientious Judge does not need their spur but will be helped by the facilities they may afford for better procedure. In connection with the constant and appropriate demand for promptness in the disposition of controversies, it must be remembered that judicial work demands deliberation. It is not aided by impatience or by unduly hurried and ill-considered action. Thorough consideration and careful decision minimize the chances for delays through appeals and reviews. We cannot afford to lose the ideal of a fair and adequate hearing in a passion for expedition, or to make the processes of the law a mere vehicle for prejudgments or for a mere sorting of facts to suit a preconception of policy.

If democratic institutions are to survive, it will not be simply by maintaining majority rule and by swift adaptations to the demands of the moment, but by the dominance of a sense of justice which will not long survive if judicial processes do not conserve it. The Judge must in truth represent authority, but he is the symbol not so much of power as of justice,—of patience and fairness, of a weighing of evidence in scales with which prejudice has not tampered, of reasoned conclusions satisfying a sensitive conscience, of firmness in resisting both solicitation and clamor. It is in the quality of judicial work—whether performed by courts or by agencies invested with judicial functions—in its expertness, thoroughness, independence and impartiality, that the whole scheme of the law, of government by law, comes to the decisive test. And only as that test is successfully met will the foundations of a sound democracy be made secure.



Underwood & Underwood

HON. CHARLES EVANS HUGHES
Chief Justice of the United States

REPORT OF DIRECTOR LEWIS

THE announcement of two gifts from the Carnegie Corporation to the American Law Institute of $65,000 and $30,000 was made by its Director, William Draper Lewis, in his annual report at the opening of the three day sessions of the 18th Annual Meeting of the Institute at the Mayflower Hotel today. The $65,000 appropriation is for its work in various Restatements of the law already under way. The $30,000 appropriation is to undertake a new subject—the Restatement of the law of Judgments. Work on the latter subject is commencing at once, the Council having appointed professors Austin W. Scott and Warren A. Seavey of the Harvard Law School in charge of the preparation of the new Restatement.

Director Lewis reported that an additional grant from the Carnegie Corporation means the continuation of the Institute's present work for another year, and the beginning of a Restatement of the important law of judgments. He further said:

"Since your annual meeting last May, as then ordered by you, the fourth volume of our Restatement of the Law of Torts has been published; its publication marking the completion of our work on the subject, a work begun seventeen years ago. There is satisfaction in a task completed, especially when it has been long and hard. But the Institute's Plan of Work is the development of successive drafts by group work. It, therefore, involves the working together in close association of Reporters, Advisers (a misnomer for collaborators), assistants and that person who performs the jobs of chairman, supervising editor and Director. A group in which mutual respect and friendship did not steadily increase could not go on. In our work in Torts, as in other subjects, each conference was more enjoyable, better fun—I use the adjective advisedly—than its predecessor. The friendships formed will last through life, but in spite of the satisfaction felt in the completed task, the quarry caught, there is the inevitable regret that the chase is over."

The status of some current projects was reported substantially as follows:

Property.—Two volumes were published in 1936,—Introduction, Freehold Estates, and Future Interests (Part I). The rest of Future Interests, with a chapter on Expectancies and another on Powers of Appointment, about 900 pages in all, should be published next year. A fourth volume, covering Easements and Licenses, and Covenants Running with the Land, is planned for.

Security.—The greater part of Suretyship has been covered by a draft, with extensive explanatory notes. Work has also been done on Pledges and Liens. The whole, approximating 600 pages, should be ready for publication in the fall of 1941. The subject of Real Estate Mortgages has not yet been undertaken.

Judgments: A New Project

Judgments.—On this new project Director Lewis said: "Immediately after receiving word from the Carnegie Corporation of their generous donation of $30,000 for work on this important subject, the Council appointed Austin W. Scott and Warren A. Seavey, of Harvard Law School, as Reporters. I cannot tell you anything you do not already know about either Mr. Scott or Mr. Seavey. Mr. Scott's work as Reporter for our Restatement of Trusts and Mr. Seavey's work as Reporter for Agency, together with their work as joint Reporters for the Restatement of Restitution, is known to all of you. A nucleus of Advisers has already been selected and a preliminary conference of the group was held on May 4 and 5.

"The clarification by Restatement of the law relating to Judgments is very much needed. No good analytical and constructive work has ever been done on the subject. This fact, however, renders any exact estimate of the time which the Restatement will occupy impossible. Even the estimate that the text of the sections, their comments and illustrations will take some 500 pages is little more than what we may call an 'educated guess.' The present plan of work is to take up first what is believed to be the more difficult parts of the subject so that a Tentative Draft of the sections pertaining thereto can be submitted for your consideration next year. If possible we desire to complete the work so that the Restatement can be published in the fall of 1942."

Future of the Institute

Director Lewis concluded: "The continued generous cooperation of the Carnegie Corporation referred to in the first part of this report assures our ability to hold our Annual Meeting next year. It does relieve a situation which as stated last year was both serious and immediate. Of course, we all realize that we have not as yet solved the problem of the continuance, at least over a series of years, of the Institute as a going organization. On this problem the Executive Committee of your Council has been and is working.

"We have built up an organization which is unique in the fact that in it the judge, the practitioner and the foremost members of our law school faculties have learned how to do serious, constructive and difficult work together for the improvement of justice. The desirability of rounding out our work on the Restatement of Property by the inclusion of a Restatement of the Rule against Perpetuities and kindred matters as well as the Restatement of Covenants Running with the Land and also the completion of the subject "Security" by including in it a Restatement of the law pertaining to Real Estate Mortgages is, as you all realize, imperative. Furthermore, there is now and will continue to be work other than Restatement of prime public importance which we, because of our organization, experience and professional and public confidence, are peculiarly well fitted to do.

"Thus the difficulty confronting the Executive Committee does not lie in the absence of work which can be done effectively only by the Institute or some new association organized on identical lines and following our distinctive plan of work. Moreover, recent experience indicates that there has not, and will not, be serious difficulty in obtaining the necessary funds to carry on efficiently the work of our editorial force if, and I may add only if, donors are assured that the editorial force will be adequately supervised and its results submitted to an Annual Meeting representing the leaders of our profession. The difficult problem before your Executive Committee is to place the Institute in a position to say to those interested in specific improvements of the law that our central organization with its Council and peculiarly successful Annual Meetings will continue to function."

REPORT OF JUDGE GOODRICH

Judge Goodrich made an extremely interesting report on Professional Relations. He said, among other things:

"We have been restating the law for seventeen years. That is a long time to anybody except an archeologist or a geologist. Since we began nations have risen and have been swept away. Our own country has gone through profound changes which tested both the strength of our economic organization and our structure of government. This period of stress and strain still continues.

Law and World Disorder

"In contrast with the strife of a war-torn world or in contrast with our nation's titanic efforts for economic readjustment, our less spectacular projects may seem, to some, like children playing with dolls while the family home is on fire. Yet the same may be said of the labors of every teacher in every school, of every research man in pure science in every laboratory, of every one in fact whose energy is directed beyond the immediate needs of today and tomorrow. Unless we have completely lost faith in the ability of men to build for themselves a decent civilization, the law which governs men in that civilization is of high importance. We need make no apologies for the role we are playing, if we play it well.

"We have worked diligently, earnestly and, we hope, intelligently. Are we making an effective contribution to that part of the social order with which we are most intimately concerned, the common law and modern legislation for its improvement?

Institute Does Not Claim Law-Making Power

"We are making a contribution if law students in schools, if judges on the bench, if lawyers in their offices and the courtroom, look to what we have said as important and authoritative. They need not always agree with us. We claim no lawmaking authority for a people under a Constitution. Much less do we claim divine revelation in conclusions reached either in these meetings or in the discussion by the Council or in the various groups drafting our material in a particular field. But if we are looked to as the authoritative source of statement of modern American law, surely we have accomplished on the technical side what we hoped to accomplish when this enterprise was started at the first Annual Meeting on February 23, 1923. Obviously, the question is not one which can be answered by the weighing or measuring process. While the test of our accomplishment is not as intangible as trying to decide the situs of a chose in action, it is one which is hard to ascertain through the medium of concrete facts. But, as every lawyer knows, concrete facts are the things upon which conclusions should be based. Let us then look at the factual evidence.

"If one does something important it is sure to be talked about among those interested in the field of endeavor. Since the beginning the Institute has been front page news in legal periodicals. . . The flow of discussion about the American Law Institute in the legal periodicals continues almost constant.

Keeping Up With the Law

"In spite of all this professional information, a constant stream of which has appeared over eighteen years, lawyers tell me there are still members of the profession who know nothing about the Institute or the Restatement. There is no doubt that this is the fact, but the Institute has no authority to make lawyers read about things of importance to them. In Pennsylvania we have had for nearly three years a Pennsylvania Rules Committee, which is an arm of the Supreme Court. This Committee recommends to the Supreme Court revised rules of procedure for the State of Pennsylvania and when the rules are promulgated by the court they are law. Yet a very good lawyer from a Pennsylvania town wrote me a few weeks ago that he had heard 'that there was to be a new practice act in Pennsylvania,' in spite of the fact that the court in which he practices law and the judge before whom he tries cases are bound by the rules promulgated months ago and they will both be in a peck of trouble if they do not follow them. Among lawyers, as among other people, there are those who have eyes and see not and ears and hear not. Here, as elsewhere, the seers and hearers are the effective members of the profession and they know a great deal about the American Law Institute. . .

Effect of Erie Railroad Co. v. Tompkins

"The citation of the various subjects of the Restatement by the courts of the various states and the federal courts, this year is shown in comparative fashion, figures for 1938 and 1939 being laid side by side. The figures are too clear to require comment. It is worth pointing out again, as has been pointed out before, that in general the citations are most frequent where one of two things is present. Where we have a judge or two on the court who is particularly interested in the Restatement the number of citations always rises. Also, where we have in a given state, a healthy, vigorous annotations program, that has a tendency, also, to increase judicial use of the Restatement. The number of citations in federal courts continues to be very satisfactory. We may hope that such use will keep up and perhaps increase. Since under Erie Railroad Co. v. Tompkins the federal courts must now follow the common law in matters involving local law only, perhaps the federal courts can look to the Restatement to find the common law of a particular state. Especially may this be true where the analysis of the annotations in comparison with the Restatement has shown that a given state follows very closely the common law as expressed in the Restatement. The Supreme Court, unintentionally no doubt, has made the Restatement all the more important as one of the collateral results of the decision of Erie Railroad Co. v. Tompkins."

INSTITUTE'S ACTION ON DRAFTS

The following final drafts were adopted by the Institute at its recent meeting:

1. The Model Code of Evidence.
2. Property (Vol. 3).
3. Security (Drafts 3 and 4).
4. Youth Correction Authority Act.

The *Youth Court Act* (the shorter and less important of the two Criminal Justice-Youth statutes) was not adopted by the Annual Meeting, but was referred back to the Council of the Institute for further consideration.

PRESIDENT ROOSEVELT SENDS GREETINGS

The following letter was then read:

THE WHITE HOUSE

Washington,
May 9, 1940.

My dear Mr. Lewis:

I take great pleasure in greeting the members of the legal profession who are attending the Eighteenth Annual Meeting of the American Law Institute, and extending to the Institute my best wishes for success in its many commendable endeavors.

The Institute has made many constructive contributions of outstanding character to the advancement and improvement of the law. I am gratified to observe that it is not restricting its activities by the traditional framework of juridical science, but has extended its studies to such matters as treatment of juvenile delinquents.

Much has been accomplished in recent years in the direction of simplification of civil procedure and coordination of the operations of the courts, especially in the Federal field. Much still remains to be attained in the realm of criminal law and penology. I am hopeful that the Congress will make provision for the regulation and simplification of Federal criminal procedure by means of judicial rule-making, similar to that made by it several years ago in respect to Federal civil procedure.

The Institute is in a position to render signal service to the advancement of penology. Not only the treatment of juvenile delinquents, to which it is already devoting attention, but also such matters as indeterminate sentences, probation and parole, form fruitful subjects for studies of the type that the Institute has so effectively undertaken and successfully pursued in the past.

These phases of the administration of justice touch practical life in a true sense. As members of the legal profession we must always bear in mind that the law is not a detached science, but is the hand-maiden of society. It must be adjusted, as nearly as possible, to the requirements of shifting social and economic conditions. As has been truly said, "the final cause of law is the welfare of society."

Very sincerely yours,
Franklin D. Roosevelt.

DISCUSSION OF DRAFT RESTATEMENTS

Code of Evidence

Tentative Draft No. 1 of the Code of Evidence was the first item of new business upon the agenda. It deals with the qualifications, examination and privileges of witnesses and includes a few rules governing the procedure applicable to evidence. The Reporter began by stating the experience at the bar and on the trial bench of the twelve men who had participated in making this draft. Four of them have had service as trial judges, covering from eight to fifteen years, and all of them have been in active practice; one for only two years, the others from six to twenty-three years. The four judges have, in addition, had experience on the Appellate bench.

Dean Wigmore Dissents

The first question presented concerned the general form and plan of the Code. It is drafted in such form that it may be enacted by a legislature or adopted by a Court. To this there was no objection. Dean Wigmore, the Chief Consultant, however, proposed a formulation very similar to his Code of Evidence (2nd ed., 1935), which covers nearly 550 pages. In particular, he advocated a draft which would contain a definite affirmance or repudiation of each concrete rule that has been passed upon in the majority of jurisdictions, rather than a group of generalized statements. Each such rule should be only a guide to the trial judge, directory not mandatory, and his rulings in the application of any such rule should be subject to review only in extreme instances. The Reporter and his Advisers have proceeded upon a different assumption. They began by abolishing all disqualifications and privileges of witnesses and making all relevant evidence admissible, except as otherwise provided in a later rule. This, they believe, makes unnecessary a specific repudiation of any rule heretofore in force. They have not disturbed the existing law, making rulings reviewable for abuse of discretion. The rules submitted are much more general than the Consultant desires.

Judge Clark's Views

In contrast to the position of the Consultant, Judge Charles E. Clark argued that these rules were much too detailed; they should be broad grants of power with details left to the discretion of the trial judge. The present draft, he urged, should be regarded as a sort of restatement of the existing law and should serve only as a basis for deducing a very few general rules, which should constitute the final code. After discussion the Institute voted to approve the plan and form of Tentative Draft No. 1, preferring them to the proposals of Dean Wigmore and Judge Clark.

Thereupon Rules 1-12 and 101-115 were discussed seriatim. Many members submitted suggestions for further consideration by the Reporter and his Advisers. There were motions to expunge a few of the rules on the ground that they regulate procedure rather than evidence, but they were voted down. Rule 10, allowing comment by the judge on the weight of evidence and credibility of witnesses, and Rule 101, which, among other things, makes an interested survivor a competent witness, were the subject of sharp debate, but were approved as submitted. Rule 104 was amended by striking all but its first paragraph, and Rule 111 was slightly changed. Lack of time prevented consideration of the rules following Rule 115.

DEAN WIGMORE STATES HIS POSITION

"For the sake of starting with a common understanding, and of saving time by reference to accepted principles, the following Postulates are proposed for adoption or rejection:

"*Postulate I. Objective.* The purpose of these formulations is not merely to re-state the rules of Evidence as they are, but as they *ought to be* and *can practically be*. Nor is the purpose limited to selecting the best, or more recommendable, rule where there are two or more variant ones in different jurisdictions; for if sound policy demands, a rule may here be formulated that is not yet the law in any jurisdiction.

"But this formulation of an ideal set of rules

is to be guided and limited by the *practical probability that the Bench and the Bar will accept and use* a rule here proposed.

"Postulate II. Scope of Topics. The rules here formulated will furnish a complete code, i. e., will cover *all* the topics, i. e., all that have commonly arisen in trials and that have resulted in a body of rulings in a majority of States.

"Postulate III. Terminology. Although this Code is intended to be progressive and liberal, and to discard any crude shibboleths or irrational limitations now embodied in the rules of Evidence, yet in so doing it must endeavor, as a Code for practical use by practitioners, to avoid so far as possible the use of scientific generalizations *in terms and expressions which are complex, novel, and unfamiliar to Bench and Bar,* and which therefore do not on their face convey clearly their application to the every day situation which they seek to govern. Such terms, proper enough in a treatise, are out of place in a practical Code.

"Postulate IV. Details. This Code, aiming as it does to become a practical guide in trials, must not be content with *abstractions,* but must *specifically* deal with all the *concrete rules exemplifying the application of an abstraction,* that have been passed upon in a majority of jurisdictions; the Code specifically either repudiating or affirming these rules. If the objection be made that the law of Evidence should no longer remain a network of petty detailed rules, the answers are first that both Bench and Bar need their guidance in order that a *normal routine* be ordinarily followed for *speedy dispatch at trials* without discussion; secondly, that the Bar needs them in order to *prepare evidence for trial* along normal *expected* lines; and, thirdly, that the really effective way to eliminate the present frequent overemphasis on detailed concrete rules, is to provide that they shall be only *guides,* not *chains,—directory,* not *mandatory,*—and therefore to *forbid the review* of the Trial Court's rulings, except in extreme instances.

"Postulate V. Repeal. All changes of existing rule negativing some existing principle are to be *expressly stated* in the Code and not left to implication from the text.

"Postulate VI. Comment. Comment is to be reserved for interpretation of the text, and will not contain any statement *amounting to a rule of practice additional* to the text."

"These postulates in my opinion were not followed by either the Reporter or the Advisers. I believe the Tentative Draft here presented fails substantially to conform to any of the six Postulates."

The Reporter, Prof. Morgan, says:

The Reporter and his advisers approve all of the six Postulates except the fourth and believe that the Rules as submitted substantially conform to them.

Youth Correction Authority Act

THE Youth Correction Authority Act was approved by the body of the Institute without any serious controversy whatsoever. The most important changes proposed from the floor concerned the length of time during which a youth might be held under the control of the Authority without the necessity for a court order confirming the continued control. As the Act was drafted and finally approved, the control, with some minor exceptions, may be continued when necessary for public safety until the person attains the age of 25 years. One proposal would have changed this provision so as to limit the duration of control to a period of five years following the date of commitment. It was the ultimate weight of opinion, however, that there are real advantages to society in holding a youth when necessary to a time of relative maturity.

A second proposal was to the effect that when this limit of control without the necessity for court order had been reached every individual should necessarily be discharged without regard to his dangerousness to the community. The overwhelming opinion from the floor, however, was to the effect that if a court were satisfied that discharge would be dangerous to the public, the continuance of control by the Authority might properly be confirmed.

Almost every other suggestion made from the floor had to do with the verbiage rather than with the substance of the Act. Discussion was thorough and analysis of the Act in its details was critical, but it was eventually approved without change and with no substantial dissent whatever.

WHAT THE "AUTHORITY" IS

The following summary of the Youth Correction Authority proposal has been made public by the Institute:

Board to be Created, Called "Youth Correction Authority"

The new state agency provided in the model act submitted by the Committee calls for an appointive board of three persons of special qualification to govern the correction and rehabilitation of young persons after conviction. The board would be known as the Youth Correction Authority, have terms of nine years, and would be responsible for the organization, administration and determination of policies for integrating the handling of young offenders on a state-wide basis.

The Committee asserts that the purely punitive system of criminal justice has failed in two major objectives—the protection of society and the reformation of the individual. The Committee's inquiry shows an unchecked rise in recidivism (repetition of crime) and in offenses committed by the gang-age youth group under the retributive penal system. The Committee believes that substituting a system of individualized training and treatment for retributive punishment would more effectively fulfill the objectives of our criminal justice.

The new Youth Correction Authority would be authorized to set up district units within the state and to employ psychiatrists, educators, etc., to carry on its corrective and segregative activities. The Authority

would have the power to approve or to establish places of preliminary detention for young offenders, and for the examination and study of persons committed.

Judge Determines Guilt

The trial judge would have the usual discretion in acquittals and assessment of fines; but in all convictions excepting those involving the death sentence or life imprisonment, the judge would commit the youth to the Authority. The judge thus would exercise the established judicial function of determining guilt, rather than emphasizing the length of sentence.

Following out its philosophy that public safety can best be protected by segregation and corrective treatment, the Committee then recommends that the Authority have all control over the youth as to his detention, imprisonment, training and treatment. To the extent that necessary funds are available, the Authority may establish and operate a treatment and training service, create the necessary administrative districts and employ personnel needed to conduct its functions. In any case, it would have power to make use of law enforcement, detention, probation, parole, medical, educational, correctional, segregative and other facilities of public and private institutions and agencies within the state. The model act specifies that this provision would give the Authority no control, however, over the facilities of these institutions—but that its dealings with them should be on a cooperative basis.

Committal of Young Persons to Authority

When a person is committed to the Authority, it would immediately investigate him as an individual, psychologically, physically and as to his social background. It would make periodic re-examinations of all persons within its control and keep written records on each case.

The Authority would have the power—with specific limitations protecting the constitutional rights of the individual, such as court reviews at age 25—to keep any youth under supervision and control so long as "in its judgment such control is necessary for the protection of the public." It also could discharge such persons as soon as "in its opinion there is a reasonable probability that they can be given full liberty without danger to the public."

The individual treatment procedures are the main objective of the plan. The treatment and training service would seek to integrate the handling of the young offender and to eliminate the haphazard and contradictory processes often found under the present system, where varying sets of officials handle the individual as he goes through the mill.

Evils of Present System

The Committee's inquiry has disclosed many evils in the handling of young defendants all along the line. Among the major defects stressed in the Committee's findings are: bad detention conditions, exposing the innocent as well as the guilty to debasing experiences; lack of segregation in jails and detention prisons over the country; prolonged and unnecessary delays before trial; complicated court procedures and routine handling; lack of individual treatment or integration of handling after conviction, and the mingling of first offenders with hardened and often vicious criminals.

"More criminals are made than unmade by our present system of handling youthful defendants," the Committee asserted.

The comprehensive statistical study upon which the Committee based its findings shows both the extent of crime among youth and the failure of the punitive system to combat it. The study underlines the following startling facts:

Startling Figures

Youths—our children from sixteen up to twenty-one—are only an eighth of our population over fourteen years old, but they are a fifth of our criminals. Youths commit those offenses against property which make up the bulk of our serious crime—burglary, larceny, robbery and auto-theft.

The property offenses committed by youths are the habit-forming crimes. Reformatory and prison records show that neither the threat nor experience of punishment stops youths from recommitting crimes. The repeaters start as youths and continue their crime careers on into adulthood.

Too often a youth caught in the criminal net will end up as a killer. More than 30 per cent of the nation's convicted killers in a typical year had previous records—which means murder was no accident for them, but the result of their outlaw careers.

The youth, because of lack of segregation, is likely to receive a thorough education in crime in reform school or prison. Inflexible handling prevents real effectiveness with present rehabilitation efforts.

The Committee believes that these conclusions indicate the necessity for revision of procedures so as to combine proper handling and treatment throughout the entire system. It believes that such a plan would act as a true measure of crime prevention and control because it would nip criminal careers at the outset and cause offense rates of later age groups to decline with time.

The Committee on Criminal Justice-Youth had the voluntary assistance of 150 consultants from the various fields of law, prison administration and criminology. The Committee itself is composed of the following members:

Personnel of Committee That Made the Study

Dr. William Draper Lewis, Director of the American Law Institute, Chairman; Curtis Bok, President Judge, Court of Common Pleas, Philadelphia; E. R. Cass, executive secretary of the American Prison Association; Dr. Sheldon Glueck, professor of criminology at Harvard Law School: Leonard V. Harrison, director of the Committee on Youth and Justice, Community Service Society of New York; Dr. William Healy, director of the Judge Baker Guidance Center for Children and Youth, Boston; Edwin R. Keedy, professor of law at the University of Pennsylvania; Austin H. MacCormick, executive director of the Osborne Association and former Commissioner of Correction for New York City; William E. Mikell, professor of law at the University of Pennsylvania; Dr. Thorsten Sellin, professor of Sociology, University of Pennsylvania and research consultant for the committee; Joseph N. Ulman, Judge of the Supreme Bench of Baltimore; and Dr. John B. Waite, professor of law at the University of Michigan and reporter for the Committee.

PROCEEDINGS AT ANNUAL DINNER

THE president of the Institute, Hon. George Wharton Pepper, was toastmaster at the annual dinner on Friday evening. He put the audience in good spirits at once:

"When one considers the plight of the rest of the world there is a strong temptation to outlaw laughter and to condemn mirth as unworthy. On reflection, however, this is seen to be a morbid tendency. We owe it to ourselves and to others to preserve our balance, to live normally and to let sunshine and shadow alternate as they may. Only thus can we rightly estimate the blessings of peace and be properly grateful for the means of preserving it.

"It is becoming our custom at this annual dinner to comment upon the State of the Union or at least on that important part of it which we style the American Law Institute. Outside the limits of our own field it is probably wiser not to stray. We live so happily under the benevolent despotism of Director Lewis that, if we allow ourselves to think, we might easily be led to question the value of a representative democracy—whatever that may be. In the Institute we indeed preserve the fiction of parliamentary forms and in theory we subject our Restatements to the test of acceptance by Council and Annual Meeting—but we all realize that in the last analysis the law is what the Director says it is.

Somebody Must Declare the Law

"After all, somebody has to declare the law; so why not our Director? Some old-fashioned people still think that this is the business of a court. But there are obvious disadvantages in the workings of a judicial system. In the first place there is lack of agreement among judges respecting Lord Coke's proposition that 'the known certainty of the law is the safety of all.' Such a statement certainly sounds plausible, as, for instance, when applied to the movement of motor vehicles on the highway. But there is a large and growing body of opinion that favors a different doctrine: not that 'the known certainty of the law is the safety of all' but that 'the known uncertainty of the law is the pleasure of the few.' 'The few,' I hasten to add, are *not* the practising lawyers. Our livelihood depends upon some degree of legal certainty—upon at least the possibility that our advice may coincide with what the court will decide. The client is an obliging fellow but he cannot be expected to continue forever to hand over his earnings to an oracle whose predictions are consistently falsified by the event. The really desirable situation is one in which the rules of law are certain and are authoritatively declared but in such terms as are wholly unintelligible to the layman while understandable by superior minds at the bar and on the bench.

Uses of the Black-Letter

"It is here that the American Law Institute comes in. I had to explain this the other day to a lawyer of national reputation who specializes on professional compensation. He complained that our black-letter restatements are obscure and that a client reading them would be apt to get the impression that law is unascertainable. I think I satisfied my friend that we are in fact rendering him a great service. If the Restatement were intelligible to the client, the attorney, I argued, would be out of a job. 'But,' he objected, 'how am *I* to tell what it means?' I told him that every well-equipped law office should have two young assistants fresh from the Law School, one to interpret the new Rules of Procedure and the other to instruct the members of the firm in the meaning of the Restatement. I saw a look of relief in his eyes and I think he went on his way reassured. We are also rendering a notable service to some of the courts. The Circuit Court of Appeals for the Third Circuit, for example, had for a time a bad record on reversals by the Supreme Court. It seemed as if the two sets of judges did not speak the same language. Now, however, the situation is different. Our Dean Goodrich goes upon the Circuit bench taking our Restatements with him. He interprets our black-letter to his delighted colleagues. He explains that a majority of the Justices of the Supreme Court have minds hungry for the sort of law which the Institute propounds; and points out that if both tribunals accept the Restatement as a Bible, happy affirmances will be substituted for bleak reversals.

Hard Case from California

"Of course, we must admit that there are social and economic difficulties which even our black-letter cannot completely eliminate. Take a case in which conflict of laws runs head on into a conflict between husband and wife. We all noted the recent California case in which a wife, averring herself to be a resident in County A, brought an action for divorce in the court of that county. The husband denied that she was a resident of A and challenged the jurisdiction of the court. The fact was that the line between County A and County B ran between their twin beds and that the wife's bed was in B. For a moment it looked bad for the wife. She, however, was resourceful. She said that whenever her husband was passing the night elsewhere she was accustomed to occupy *his* bed and that this happened so frequently that she had acquired a residence in County A. The Court took the matter under advisement. I fear that this is one of the few situations which the Director has overlooked and that our black-letter is at fault in not covering it.

"I certainly take off my hat to the successful Dean of a modern law school. His march is far from being untroubled. The trustees of the institution are apt to command 'eyes right.' The faculty insistently orders 'eyes left'; and if the Dean compromises by looking straight ahead all he sees is his duty—and almost everybody gets tired of looking fixedly at *that*."

Thus felicitously did Mr. Pepper introduce the first speaker of the evening, Dean Edwin D. Dickinson, of the School of Jurisprudence of the University of California, who spoke on "Contemporary Criticisms of Lawyers and the Law and a Plea in Confession and Avoidance."

Dean Dickinson said in part:

"NEW manifestations of the venerable tradition hardly deserve attention. The continuing and increasing confidence which the public places in the legal profession provides sufficient answer. Mr. Percival Jackson, in his recent book "Look at the Law," reveals an expansive imagination when he depicts the layman as framing an indictment in no less than ten counts. Some of his counts are culled from the stuff of which a hoary lay tradition has been made. Others, including some of the most important, are essentially lawyer criticisms of the law. Briefly the more common

lay criticisms are (1) that the law is too technical, (2) that the law is too slow, (3) that the law is too expensive.

"Let us by all means pursue and eliminate the vices of needless technicality. But let us act upon sounder proof than is provided by mere illustrative enumeration. All will concede that the law has sometimes been too slow. Perhaps it will be conceded also that much has been, that much is being, accomplished to eliminate abuses. May I suggest with diffidence that speed in litigation is not the sole test of the efficacy of that comprehensive system of legal planning, legal counselling, adjustment out of court, and adjudication in court that we call the law? I hope, though with some diminution of confidence, that most lawyers may soon come to see that the law is too expensive. For myself, having been for several years the target for much lay criticism of the law, I find the general charge in Chapter eight of Mr. Jackson's book easier to confess than to avoid.

"Our own lawyer critics remind us, with increasing insistence, (1) that there is too much law, (2) that the law is too uncertain. Until we have condensed and simplified and systematized the unmanageable mass. there can be, for the common man, no safe highway of the law. This is preeminently a lawyer's task. To its achievement, every agency of the law—legislative, administrative, judicial—and every organization of lawyers, must be courageously dedicated.

"With such a chaotic mass of uncoordinated guides to legal action, we are told that law has become hopelessly uncertain, that bench and bar are human, that their real reliance is upon mere symbols, undisclosed social or economic premises, or sheer prejudice, and that over it all spreads the mystic nonsense of law as a "brooding omnipresence" in the skies. Thus the law becomes a means of oppression rather than an instrument of justice. That we have made a modest advance is suggested by no less an authority than the President of the United States in his message read at our opening session. I suggest timidly that the statement in that message is also "good law."

"On the larger front, how uncertain is the law? I confess to a fear that it is more uncertain than we would like to have it. I concede that there remains much to be done. Indeed, that the task is of an appalling magnitude. But, again, may I express the hope that the strategy of our attack will be guided by something more trustworthy than proof by illustrative enumeration?

"Surely there is no security in a flight to rigidity. Nor in the defeatism which would lead lay hosts in a frontal attack upon the law and its administration. Exaggeration of lay capacities to do the things that experts must do for laymen is no service to democracy. Clearly the lines must be held under lawyer leadership. And the ultimate victory won by better and more broadly trained lawyers, judges, and law teachers."

SENATOR PEPPER AND JUDGE HAND

In introducing the second and last speaker, Judge Learned Hand, the toastmaster, said:

"At a meeting like this the judges are at their best. Unembarrassed by precedent, relieved from the necessity of deciding against either litigant, too mellow to be regretful that they cannot decide against both, they are just a delightful group of American gentlemen.

"Certainly we couldn't spare our next speaker. Among all the delightful companions I have known, none outranks him; and we of the Institute have good reason to be grateful to him for illuminating our deliberations and cheering us on our way. His names (both first and last) lend themselves so readily to jest or pun that I deem it a sacred duty to refrain from both. I should like to describe the qualities which in combination make him so acceptable to us; for, after all, the demands on a modern judge are almost as exacting as those upon a modern dean. The task baffles me, however."

Judge Hand replied by repeating what he said his conversation with Mr. Pepper had been, when the latter had invited him to speak, and had suggested that he "be funny." He said that the invitation had been extended to him as a last resort, after all other possibilities had been exhausted, and that he had refused. He finally rose to the bait however, when Mr. Pepper, like an expert angler throwing out his line, had said: "Well, Judge Hand, if you will not speak—suppose we arrange it this way: You preside at the dinner, and I will make the speech." This was too much for the Judge, and he finally consented to make the address himself, although he know that he could not "be funny" in these trying days. He spoke with deep emotion of the incredible horror of the daily events in Europe, and the depression that everyone must feel as he contemplated the responsibilities and the sacrifices that were necessary to undertake, and the troublesome questions that would arise after the war. Sometimes the clouds seemed so dark, he said, that one felt that never again would there be light. However, dark as everything

Harris & Ewing

HON. LEARNED HAND
Judge, United States Circuit Court of Appeals, Second Circuit, Vice-President American Law Institute

was, the sun occasionally burst through, and gave courage to those on whom the burden rested heaviest.

He continued by saying that, difficult as it was to go about this work with equanimity, the members of the American Law Institute, even though the importance of their work might seem to be dwarfed in the light of present world events, must realize that they had a real task to perform now more than ever before, and that nothing must be allowed to stand in the way of its continued performance.

A hushed silence, followed by prolonged applause, reflected the feelings of all who heard his words.

Philadelphia, a Historic and Modern City

(*Continued from page* 469)

ever designed, including facilities for regularly receiving and sending out mail by aeroplanes which land on and take off from the roof of the building. Latest in this series and simple and massive in line is the new United States Court House, impressive in its very simplicity. This is now occupied by the Circuit Court of Appeals for the Third Circuit and by the local United States District Court. The new building of the Municipal Court of Philadelphia stands beside the Free Library on the Parkway and the two structures resemble each other in size and design.

Architectural Beauty

These and other notable examples of architecture in Philadelphia may be somewhat incredible to those who have heard only of its "red brick fronts, with marble trimmings," which, incidentally, are by now a rarity. A century ago, visitors referred to the city as "the Athens of America," a title which reflected the refined taste and the love of the classic shown in the character of its public buildings. Among such structures is the old Merchants Exchange which has now fallen upon evil times and which has been robbed of its glory by additions and subtractions, though still a majestic relic. Other outstanding examples are the Ridgway Library and the Old Custom House, both having pure Doric facades. The main building of Girard College has been declared the finest example of Corinthian architecture to be found anywhere outside Greece itself. What is believed to be the first Palladian window in any building in this country is found in the eastern end of Christ Church, constructed more than two centuries ago.

Art, Literature, and Science

Quite outside its industrial enterprises, Philadelphia is famed as a pioneer in the establishment of scientific and art organizations, whose efforts have made it known throughout the cultural world. Its museums are noted for their complete and, in some instances, unique collections. The first Arctic expedition ever organized in America set out from Philadelphia. Its libraries, public and private, have earned a deserved reputation for the city in the fields of literature and historical research, and many landmarks connected with those eminent in the arts and sciences and in literature may still be seen.

It has been said of Philadelphia that it is at the same time the most English and most American city in the country. This paradox is readily explained, however, when we consider that it was founded by sturdy Britishers who formed the Colonies on this side of the Atlantic and brought with them their native love of law, order and freedom which lie at the foundation of American life.

ARRANGEMENTS FOR ANNUAL MEETING, PHILADELPHIA, PENNSYLVANIA, SEPTEMBER 9-13, 1940

Headquarters—Bellevue-Stratford Hotel

Hotel accomodations, all with bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin beds for 2 persons	Parlor suites (2 rooms for 1 or 2 pers.)
Adelphia (13th & Chestnut)	$3.50–5.00	$5.00–6.00	$6.00– 8.00	$12.00–25.00
Barclay (18th & Rittenhouse Sq. E.)		6.00	7.00–10.00	12.00–18.00
Bellevue-Stratford (Broad & Walnut)	All space exhausted.			
Benjamin Franklin (9th & Chestnut)	3.50–5.00	5.00–6.00	6.00– 8.00	12.00–14.00
Drake (1512 Spruce St.)	3.50	5.50	6.00	10.00
Essex (13th & Filbert)	3.00–3.50	5.00–6.00	7.00	
McAlpin (19th & Chestnut)	2.25–2.75	4.00	4.50– 5.00	
Majestic (Broad & Girard)	2.50–3.00	4.00–5.00	5.00	8.00–12.00
Manufacturers & Bankers Club (Broad & Walnut)	(Men only) 3.00		6.00	
Philadelphian (39th & Chestnut)	3.00–4.00	5.00–5.50	6.00– 8.00	9.00–20.00
Ritz-Carlton (Broad & Walnut)				12.00
St. James (13th & Walnut)	3.00		5.00– 6.00	10.00
Stephen Girard (2027 Chestnut St.)	2.75–3.25	4.50–5.50	5.50	
Sylvania (13th & Locust)	3.00–3.50		5.00– 6.00	10.00–12.00
Walton (Broad & Locust)	2.50–4.00	4.00–5.00	5.00– 6.00	8.00–12.00
Warburton (20th & Sansom)	3.00		5.00	
Warwick (17th & Locust)	4.50–5.50		7.00– 8.00	12.00–14.50
Wellington (19th & Walnut)	4.00		6.00	8.00

EXPLANATION OF TYPE OF ROOMS

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, *first and second choice* of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

TO WHAT EXTENT MAY COURTS UNDER THE RULE-MAKING POWER PRESCRIBE RULES OF EVIDENCE?

Ross Prize-Winning Essay, 1940

By Thomas Fitzgerald Green, Jr.
Professor of Law, University of Georgia

COURTS, by deciding cases, make law.[1] This is the more rational view of the judicial process. Thus the legislature and the court perform the same function. The former develops general norms of conduct; the latter develops specific and general norms —specific by deciding the rights and duties of the parties to the particular case, general, through the doctrine of adherence to precedent. The difference between the legislative and general judicial norms is formal. When judge-made law takes the shape of rules of court, the difference in form largely disappears. Partly because of, and partly in spite of, these fundamentals, doubt has arisen as to the proper spheres of statutes and rules respectively. It goes without saying that rules of court cannot contravene provisions of constitutions[2] and it has never been doubted that the substantive law[3] and the law of jurisdiction[4] are likewise immune to change by court rules. Starting with the proposition, which apparently is accepted without question, that the rule-making power does not extend beyond the field of procedure, the subject under discussion will be treated in the following steps:

I. To what extent is evidence procedure?

II. To what extent may courts under the rule-making power control procedure?

III. To what extent have courts under the rule-making power prescribed rules of evidence?

IV. To what extent may courts under the rule-making power prescribe rules of evidence?

I
'WHAT IS PROCEDURE?'

In order to determine to what extent rules of evidence are procedure it is first necessary to determine the meaning of "procedure."

" 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

" 'The question is,' said Alice, 'whether you can make words mean so many different things.' "[5]

Lawyers know that courts sometimes do make the same word mean many different things. The word procedure is an example. It has been used from time to time as an invocatory word. Professor Bohlen applies the term invocatory to a word employed to invoke a desired result.[6] Of the Conflict of Laws rule which requires the application of the law of the forum in matters of procedure Professor Beale says that although a sharp line is frequently drawn between substance and procedure there is no magic in the words themselves. He adds: "Their purpose is in most instances to describe a result rather than to give a reason. This statement is qualified only because it is believed that in a strictly limited number of situations where the interests of those concerned [the parties, the court and the respective states] are so evenly balanced as to make either result seem equally feasible, the court is justified in arbitrarily ruling one way or the other on the basis of the connotations of the terms themselves."[7] Thus, when the court desires to apply the law of the forum the result is obtained by saying that the question is one of procedure.

The difference between adjective law and substantive law was formerly important in determining what was within the Conformity Act for Federal Courts. Soon after the passage of the Act the Supreme Court stated[8] the object of the provision to be uniformity in the law of procedure in the federal and state courts of the same locality. Yet the Sixth Circuit Court of Appeals held that although the law of evidence generally was within the Conformity Act the rules controlling the scope of cross-examination were not.[9] Had Shakespeare known of this delicate distinction, it might have been in his mind when he wrote of the "nice sharp quillets of the law."[10] In a later case the same court held that the Act did not apply to evidence.[11]

Retrospective Action a Test

A statute changing substantive rights which is silent concerning retrospective operation will be construed to be prospective only. Hence the difference between substance and procedure is significant in this connec-

1. Gerland, The Operation of the Judicial Function in English Law, *Science of Legal Method* (1921) 229, 235; Gray, *The Nature and Sources of the Law* (1927) 98; Cardozo, *Nature of the Judicial Process* (1921) 124; Pound, *The Spirit of the Common Law* (1921) 172, 176, 181; Hutcheson, *This Thing Men Call Law* (1934) 2 Univ. Chi. L. Rev. 1, 9.

2. *State ex rel. Plummer v. Gideon*, 119 Mo. 94, 24 S.W. 748, 749, 41 Am St. Rep. 634 (1893); *People v. Metropolitan Surety Co.*, 164 Cal. 174, 128 Pac. 324, Ann. Cas. 1914B, 1181 (1912).

3. *Washington-Southern Co. v. Baltimore etc. Co.*, 263 U.S. 629, 635 (1924); *Shannon v. Cross*, 245 Mich. 220, 222 N.W. 168 (1928); *State v. Pavelich*, 153 Wash. 379, 279 Pac. 1102, 1103 (1929).

4. 110 A.L.R. 53 (1937).

5. Lewis Carroll, *Through the Looking-Glass*, Chapter VI.

6. Bohlen, The Reality of What the Courts Are Doing, *Legal Essays* (Univ. Cal. Press, 1935) 39, 46.

7. 3 *Conflict of Laws* (1935) 1600.

8. *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

9. "In our opinion the [state] statute is not, properly speaking, a matter of procedure, a law of evidence or a rule of the competency either of witnesses or of proof, but relates rather to a mode of examination of witnesses and is thus a subject within the personal conduct and administration of the trial." *American Issue Publishing Co. v. Sloan*, 248 Fed. 251, 160 C.C.A. 329 (C.C.A. 6th, 1917).

10. *King Henry VI, Pt. I*, Act ii, Sc. 4.

11. *West. Tenn. Grain Co. v. J. C. Shaffer & Co.*, 299 Fed. 197 (C.C.A. 6th, 1924). See Moore, *Federal Practice* (1938) Chapter 43, Evidence, pp. 3053, 3056.

tion. A New York statute changing the burden of proof on the issue of contributory negligence was held to deal with procedure and therefore to apply to pending actions.[12] In the sphere of Conflict of Laws, however, the same court held that a statute of another state, which provided for a rule of comparative negligence, would determine the burden of proof in an action in New York based on that statute.[13] This case would seem to indicate that burden of proof is substantive.

Passing from the realm of application of statutes to the domain of constitutionality we find the same test applied to determine whether a criminal statute is *ex post facto*. A retroactive statute imposing criminal liability is *ex post facto* and unconstitutional whereas a statute changing criminal procedure and applying to prosecutions for crimes committed before its passage is valid. However, it has been said that a statute which altered the rules of evidence to authorize the reception of less proof in amount or degree than was required when the offence was committed would violate the constitutional prohibition.[14] Changes in the law of criminal evidence which do not require less proof, in amount or degree, are valid.[15]

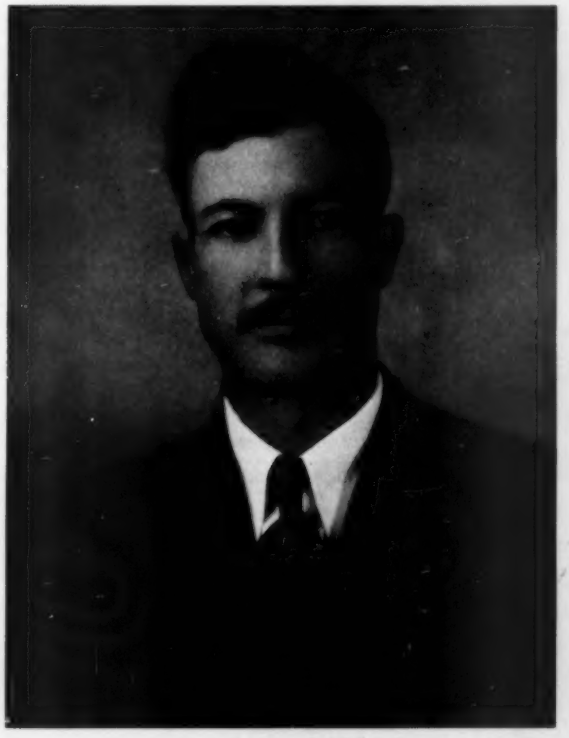
The *ex post facto* provision limits criminal and penal laws only. On the other hand, civil and not criminal law is involved in questions of conformity to state adjective law by Federal Courts and of application of foreign law in Conflict of Laws. The problem of interpreting statutes as prospective or retrospective, exists with regard to their application to previously committed crimes as well as to existing causes of action. The different scopes and the conflicting purposes of these concepts of procedure make the discovery of a conclusive test for distinguishing procedure from substance impossible. Nevertheless the greater number of precepts will receive the same classification whether for the purpose of Conflict of Laws, conformity, retroactivity, or the *ex post facto* provision. The four concepts of procedure have a common core; it is only on the outer fringes that the variations appear. Walter Wheeler Cook[16] has listed four additional concepts of procedure to which the foregoing statement applies.

Procedural Law and the Rights of Litigants

The conclusion is: Procedural law can be only vaguely defined; it is adjective law, it is auxiliary to the substantive law and provides the method of enforcing substantive rights;[17] a given rule may be treated as dealing with a substantive right in one case and with procedure in another, because of the difference between the ultimate questions in the two cases. The answer to the question, "What is procedure?" depends upon the answer to another question, "Why do you want to know?" The present reason for investigating the meaning of the term adjective law is to determine the scope of the rule-making power of the courts. The rule-making power is usually rationalized by means of the proposition that each department of government should have the power to control its own proceedings.[18] However, power to control the *modus operandi* does not extend to fixing the gravamen. A rule which changes form may at the same time affect a right which Common-Law tradition treats as fundamental. When a rule of court does attempt to change an individual's rights, isn't it entering the field which experience and the doctrine of separation of powers say is the exclusive domain of the legislature?[19]

This leads to the inquiry: In what precepts of methodology does the litigant have legal rights? It seems clear that he should have no right in those precepts which are "designed to provide for the orderly despatch of judicial business, the saving of public time, and the maintenance of the dignity of tribunals."[20] These, then, are proper subjects for rules of court. The other class of precepts, those designed to secure to each litigant full and fair opportunity of presenting his case and meeting the case against him, constitutes a more complicated problem. To what extent a canon of this second class is a matter of individual right and to what extent merely a matter of judicial convenience or of detail, depends upon public policy and the content of

12. *Sackheim v. Pigueron*, 215 N.Y. 62, 109 N.E. 109 (1915).
13. *Fitzpatrick v. International Ry. Co.*, 252 N.Y. 127, 169 N.E. 112 (1929).
14. *Calder v. Bull*, 3 Dall. 386 (U.S., 1789).
15. *Hopt v. Utah*, 110 U.S. 574 (1884); *Thompson v. Missouri*, 171 U.S. 380 (1898).
16. *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 Yale L.J. 333, 341, 342.
17. Lush, L. J. in *Poyser v. Minors*, 7 Q.B. Div. 329, 333 (1881); Pollock, *Jurisprudence* (1929) 78.
18. Pound, *The Rule-Making Power of the Courts* (1926) 12 A.B. A.J. 599; Kates, 18 *Journ. Am. Jud. Soc.* 119, 122 (1934).
19. Courts do of course establish and take away rights (Lile, *Judge-Made Law: An Appreciation* (1928) (53 A.B.A. Rep. 587, and authorities cited in note 1, supra), but they are supposed to do so by decision, not by court rule. Separation of powers is discussed in II below. Anglo-Saxon experience teaches that rights are safer with legislative bodies which are highly responsive to the popular will. See Wylie (1934) 18 Journ. Am. Jud. Soc. 114, 115.
20. Pound, *Canons of Procedural Reform* (1926) 51 A.B.A. Rep. 290, 298.



—Ball

PROF. THOMAS FITZGERALD GREEN, JR.

the concept of justice. The legislature can create new substantive rights and consequently can determine that an individual shall have a right in what would otherwise be mere procedure. When statutes have not drawn the line between procedure and substance for a given situation, the courts themselves must determine their power to adopt rules of court for the situation. If the thing to be dealt with is clearly a method by which rights and duties are to be protected and enforced, they will exercise the power; if its character is doubtful, they may decide upon the basis of policy rather than logic.

Does 'Procedure' Include Evidence?

Judges and jurists have frequently made the bald statement that procedure includes evidence.[21] This loose generalization is useful as a guide but requires explanation and qualification. Treatises and judicial opinions often speak in terms of the admissibility of evidence when the decision clearly is not based on any rule of evidence.[22] The parole evidence rule for example is a set of principles from the law of contracts masquerading in the guise of a rule regarding testimony.[23] Even if these cases, in which the wrong terminology is employed, are eliminated, all the recognized rules of evidence do not necessarily fit into the category of procedure. Probably the most of them do, but several fall in the twilight zone. The difficulty involved in classifying burden of proof was suggested above. The Statute of Frauds is considered by some to be a rule of evidence; it is thought by some to relate to rights, by others to relate to remedies.[24] The borderline must remain shadowy. Its location will vary somewhat according to the purpose of the classification. When the rule-making power is being defined, the distinction between procedure and substance is drawn for the purpose of giving the judiciary a legislative control of judicial machinery but not of individual rights. The distinction cannot be based entirely on the etymology of the two words nor altogether on the meaning given them for other purposes by decided cases. If the court or the legislature recognizes a vested interest of litigants in the particular rule of evidence, the rule is not an adjective precept but an independent right and should not be controlled by rule of court.[25]

Prima Facie, Rules of Evidence Are a Part of Adjective Law

The proper classification of presumptions is a problem to which these principles may be applied. For at least one purpose, that of the Conflict of Laws, presumptions are treated as procedure and they might be given the same classification by courts for rule-making purposes. However, some presumptions determine what facts have specified legal consequences[26] and courts might believe that such a presumption is more than a mere mode of proceeding. The presumption of innocence has been thought to be clearly a matter of substantive right and therefore not within the rule-making power.[27] The same writer says that the privilege of suppressing evidence of confidential communications is substantive. The author of a well known treatise makes this pertinent declaration:[28] "Prominent among rights with which the substantive law has endowed a litigant is that of confrontation;—the privilege of meeting the witnesses against him face to face." These rights are exceptional; normally a litigant should have no power to insist upon the continuation and enforcement of a precept which, when established, was believed necessary to prevent the jurors from being misled, but which modern courtroom experience and psychology may show ill adapted to this purpose. Since the only result of treating any given rule of evidence as a part of the adjective law and within the rule-making power is to make it subject to the will of the judges, all evidence rules should be held to be *prima facie* procedure. Then unless some pressing public policy requires otherwise the rule may be established or discontinued by those who are most familiar with its actual operation.

Like considerations apply to the interpretation of "procedure" and similar expressions in statutes dealing with judicial rule-making.[29] These words and phrases should be given a liberal construction so as to effectuate the purpose of the law-makers. Usually this purpose was to confer on the courts broad powers over the conduct of the business of the courts; that is, over methods, but to reserve to the legislature the power over substance. In at least one case[30] it has been held that "practice" in a statute authorizing a municipal court to adopt rules, includes evidence. In three other states judges have signified agreement with this decision by adopting rules relating to evidence when they had been authorized to regulate practice only.[31] In Georgia by statute the rule-making power is declared to be in a convention of the judges of the Superior Courts; in South Carolina, in the justices of the Supreme Court and the judges of the Circuit Courts in joint meeting; in New York, the justices of the Appellate Divisions. In each of these states evidential rules of court have been adopted.

II

The Rule-Making Power of Courts

The origin of the rule-making power is lost in antiquity. At first the procedure of the English courts was probably fixed by custom. The determining precepts were expressed in decisions and later in formal orders and rules of court. At an early period Parliament also took a hand—regulating procedure by legislation. It has been said that these statutes were enacted almost exclusively to achieve uniformity or to effect an alteration in fundamentals.[32] Such is our heritage from England. The American doctrine of the separation of

21. *Cochran v. Ward*, 5 Ind. App. 89, 29 N.E. 795, 797 (1892); *Sackheim v. Pigueron*, 215 N.Y. 62, 109 N.E. 109, 112 (1915); *Jones v. Erie R. Co.*, 106 Ohio St. 408, 140 N.E. 366, 368 (1922); Pollock, *Jurisprudence* (1929) 79; Restatement, *Conflict of Laws* (1934) Secs. 585, 595, 596, 597, 598. But see to the effect that evidence is substantive law *State v. Pavelich*, 153 Wash. 379, 279 Pac. 1102 (1929) and Supplement to March, 1927 A.B.A.J. 5.

22. Thayer, *Evidence* (1898) 511, 531.

23. Wigmore, *Evidence* (2d ed., 1923) 236.

24. Lorenzen, The Statute of Frauds and the Conflict of Laws (1923) 32 Yale L.J. 311, 324.

25. A beginning has been made in segregating the substantive rights in evidence. See Thayer, *Evidence* (1898) 535, 536; Chamberlayne, *Trial Evidence* (2d ed., 1936) 14-32.

26. Cook, *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 Yale L.J. 333, 354.

27. Comment (1938) Wis. L. Rev. 324, 328.

28. Chamberlayne, supra note 25, at 31.

29. See Moore, *Federal Practice* (1938) 3056; Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure* (1936) 45 Yale L.J. 622, 641.

30. *Chicago v. Williams*, 254 Ill. 360, 98 N.E. 666 (1912).

31. 1933 Code of Ga., Sec. 24-2628, for rules of court dealing with evidence see rules (Code 24-3301) 29-34, 40-42, 45, 53-57, 58, 59; 1932 Code of South Carolina Sec. 904, rules 14, 31, 34, 36, 43-46, p. 1246 et seq. of Code; Cahill's Con. Laws of N. Y., 1930, Chap. 31 Sec. 82, rules 120-142, 161-163-166, p. 170 of Clevenger's Practice Manual (1932).

32. Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures* (1936) 22 A.B.A.J. 772, 773, 774.

governmental powers has been thought by a few to destroy this inheritance. Dean Wigmore contends that the separation of powers as known in this country makes the governing of court proceedings judicial and beyond the jurisdiction of the legislature.[33] On the other hand, the late Senator Walsh used the same doctrine as an argument to support his position that the highest court of review could have no inherent or implied power to prescribe rules of procedure and could not accept a legislative delegation of such power. He conceded that a court could control the conduct of litigation before it when statutes had not undertaken to do so.[34]

The dogma of separation of powers, which developed over a long period of time as a result of the writings of Aristotle, Locke, and Montesquieu, became an implicit doctrine of the Constitution of the United States and is expressly stated in the constitutions of forty-two states of the Union.[35] Political science has discarded the theory.[36] So have many legal philosophers who substitute for the older theory a new one, the gradation of powers.[37] According to this new analysis the written constitution is at the top of hierarchy of legal norms. The enactments of the legislature come next in the hierarchy and, still lower, the pronouncements of the courts. This theory is based not on a separation of functions among distinct organs but rather upon a conception of superior and inferior powers. If this view is correct, the courts have no more power to disregard legislation in the field of procedure than in any other field. It would not prevent the adoption of court rules inconsistent with common law procedure. Whether there is any difference between rules of court changing legislative requirements and such rules changing common law has a bearing on the answer to our question since the rules of evidence are largely common law. The legislatures have not undertaken for the rules of evidence comprehensive revision such as has been so common in the case of pleading.

Whereas our courts of last resort have not kept pace with the political scientists and writers on jurisprudence who deny the reality of the separation of powers, the judges necessarily recognize that both as a political postulate and as a legal principle the doctrine is subject to many qualifications and exceptions.[38]

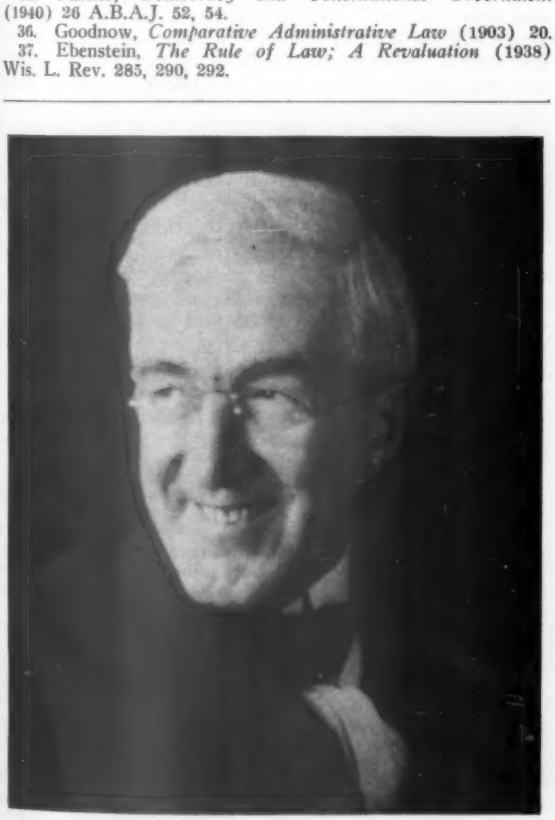
33. Editorial (1928) 23 Ill. L. Rev. 276. See also *Lee v. Baird*, 146 N.C. 361, 59 S.E. 876 (1907).

34. See his addresses in (1927) 13 A.B.A.J. 87, 91; (1930) 55 A.B.A. Rep. 525, 536; Senate Document No. 105, 69th Congress 1st Session.

35. Parker, *Democracy and Constitutional Government* (1940) 26 A.B.A.J. 52, 54.

36. Goodnow, *Comparative Administrative Law* (1903) 20.

37. Ebenstein, *The Rule of Law; A Revaluation* (1938) Wis. L. Rev. 285, 290, 292.



WILLIAM L. RANSOM
One of the Ross Essay Judges

Separation of Powers: Qualifications of the Doctrine

When judges come to apply such vague constitutional doctrines as separation of powers, due process, and general welfare, they must act as statesmen as well as technicians. "It is the task of statesmanship, using that word in its broadest sense, to determine what is socially desirable."[39] A constitution grows as the judges shape it. The judges are guided in part by the history of the constitutional language; in part by consideration of utility. Turning to history we find that the framers of our American constitutions expected the separation of powers to protect them from unchecked majority rule and from the tyranny that might result from placing all authority in the hands of a single governmental organ.[40] Separation was intended to aid in maintaining checks and balances, in preserving the independence of the judiciary, and in promoting governmental efficiency.[41]

The dangers of unchecked majority rule and of governmental tyranny throw little light on our problem, because there will be sufficient severance of authority to protect against those dangers whether the legislature or the courts or both regulate procedure. The desire for independence of the judiciary, considered by itself, furnishes an argument for the proposition that the separation of powers requires unfettered control by the courts of court proceedings, because, when court procedure can be determined by the legislature, the courts to that extent are not independent of the legislature.[42]

Checks and Balances

Separation of powers thought of as an implement of checks and balances has been said to authorize the legislature to prescribe court rules[43] and on the other hand has been said to require that the courts have

38. *Wayman v. Southard*, 10 Wheat. 1 (U.S., 1825); *Watkins v. Holman*, 16 Pet. 25 (U.S., 1842); *Wichita R. and Light Co. v. Public Utilities Com.*, 260 U.S. 48 (1922); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); Re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613 (1925).

39. Bohlen, The Reality of What the Courts Are Doing, *Legal Essays* (Univ. Cal. Press, 1935) 39, 43.

40. Sharp, *The Classical American Doctrine of "The Separation of Powers"* (1935) 2 Univ. Chi. L. Rev. 385, 396, 402, 420.

41. Id. 420, 418, 393, 400, 412, 413. See also 4 Jefferson's Works (Ford ed. 1892) 424-425; Madison in the *Federalist;* Cooley, *Constitutional Law* (4th ed., 1931) 42, 48.

42. See Kates (1934) 18 Journ. Am. Jud. Soc. 119, 122, 2d column.

broad rule-making power.[44] The system of checks and balances existing in England[45] at the time of the adoption of our American Constitutions included a joint control of procedure by courts and Parliament—a control which the courts were more active in exercising but which placed the ultimate power in Parliament.[46] As Mr. Chief Justice Taft said, "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."[47] As to the efficiency of rules of court, it has been said[48] that court-prescribed procedure has not been satisfactory, that courts do not use the rule-making power when they have it, that the judicial mind is too steeped in procedure to have a proper sense of values concerning questions of method, that fear of incurring the displeasure of the legislature or of the people will restrict the exercise of power by the courts, that courts have no time to give to rule-making, that in the case of some procedural problems the democratic ideal requires solution by a legislative body subject to the popular will, that in others, action by the judges will bring harsh criticism down upon the court because of the great division of public opinion, and that in still others the interests of the bench differ from the interests of the bar and of the public.

Answers to Criticisms

The obvious answer to the first of these criticisms is that procedure prescribed by the legislatures has not been satisfactory either. The recent adoption[49] by the Supreme Court of the United States of thoroughly modern rules which completely change Federal practice is evidence against the charges of nonuser, technical mindedness, backwardness, and timidity. Perhaps our courts have been guilty of all of these in the past but so have members of the bar and it is quite evident that many of the latter are now awake to the need for improvement.[50] The attitude of the bar will undoubtedly influence the courts. The next criticism has been answered with the proposition that the legislature has no more time to spend on the procedural law than the courts have and that the courts can have most of the work done by judicial councils or advisory committees.[51] Perhaps the point concerning unresponsiveness to the popular will can be met by defining the rule-making power so as to exclude those matters in which the people wish to have a voice. Viewed from this angle the point becomes an argument against giving the courts power over certain problems of litigation rather than an argument against all court rule-making power.

The last two objections lose much of their force when the court is assisted by a judicial council or advisory committee. The council or committee would initiate changes and the criticism would be directed against it. Furthermore, there is equal danger of criticism of the courts for the weaknesses in existing procedure.[52] The judicial council or advisory committee can be made up of representatives of the bar and the lay public as well as of the trial and appellate benches.[53] Such a body is in a position to see that the rules fairly adjust the interests of all classes. Indeed in England the rules have not been drafted with undue consideration for the convenience of the judges although the Rules Committee has no laymen on it.[54]

Advantage of Rules of Court

Rules of court have conspicuous advantages[55] in that they are made by those familiar with the requirements of practice and are interpreted by those who make them and are in sympathy with them. Changes may be made as needed. Rules may be tested and shaped to the requirements of litigation. Experience shows that when procedure is governed by rules of court, the tendency is to make adjective law simple and effective and properly subsidiary to the substantive law. The legislature will have more time for the increasingly numerous problems of substantive law.

The view that rules of court furnish the efficient method of controlling judicial practice and proceedings is becoming more widely accepted as time goes on[56] and seems correct. We cannot be certain that a given court will do a good job of revision but we do know that courts, especially when aided by an advisory body, are in a better position than legislatures to do a good job.

A recognized aid to interpretation of any constitutional provision is the discovery of the ends which the establishment of the provision was intended to attain.[57] The foregoing discussion disclosed four aims of the separation of powers, to wit, protection of the individual from absolute majority rule and governmental tyranny, independence of the judiciary, checks and balances between the departments of government, and efficiency in government. The first of these desiderata seems irrelevant for present purposes. Efficiency and independence of the judiciary would be promoted by allowing the courts full rule-making power but the desire for checks and balances leads to the conclusion that the legislature should have a part in controlling pro-

43. Cooley, supra n. 41, at 91, 92.

44. Shelton, *The Philosophy of Rules of Court*, Supplement to March, 1937, A.B.A.J. 3, 7.

45. Cooley, supra n. 41, at 187.

46. A different emphasis is placed upon the part played by the courts in Pound, *The Rule-Making Power of the Courts* (1926) 12 A.B.A.J. 599, 601. He ignores the fact that Parliament was regulating certain phases of procedure at the same time that the courts were prescribing rules. See Pollock, *Jurisprudence* (1896) 233.

47. *Ex Parte Grossman*, 267, U.S. 87, 108 (1924). See also *Shepard v. Wheeling*, 30 W. Va. 482, 4 S.E. 635 (1887); *Copp vs. Henniker*, 55 N.H. 179, 20 Am. Rep. 194 (1875).

48. Wylie (1934) 18 Journ. Am. Jud. Soc 114, 115; Gilbert and Walsh quoted in Supplement to March, 1927, A.B.A.J. 14; Warner, *The Role of Courts and Judicial Councils in Procedural Reform* (1937) 85 Univ. Pa. L. Rev. 441, 447. As to nonuser of the power, cf. Sunderland, *Trends in Procedural Law* (1939) 1 La. L. Rev. 477, 490.

49. See Clark, *The Handmaid of Justice* (1938) 23 Wash. U.L.Q. 297, 298, 301.

50. Ibid.

51. Pound, Supplement to March, 1927, A.B.A.J. 14.

52. Sunderland in Supplement to March, 1927, A.B.A.J. 2, writes of the laity's "grave dissatisfaction with the performance of the courts."

53. Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council* (1935) 10 Ind. L. J. 202, 208. Dr. S. B. Warner doubts the desirability of having laymen on the council: *The Role of Courts and Judicial Councils in Procedural Reform* (1937) 85 Univ. Pa. L. Rev. 441, 454.

54. Pound, supra n. 51. For personnel of the Rules Committee see Warner, supra n. 53, at 444.

55. Report of R. I. Jud. Council, 1929, quoted in (1930) 16 A.B.A.J. 80; Pound, *The Rule-Making Power of the Courts* (1926) 12 A.B.A.J. 599, 602. "Rules of Procedure laid down by Legislative mandate . . . embody legislative theory, not judicial experience . . ." Sunderland, *The Exercise of the Rule-Making Power* (1926) 12 A.B.A.J. 548, 550.

56. Minority Report, Com. of the Judiciary, S. 759, 70th Congress, 1st Session, reprinted in (1930) 55 A.B.A. Rep. 537, see 540; Harris, *The Extent and Use of the Rule-Making Authority* (1938) 22 Journ. Am. Jud. Soc. 27; supra n. 55; Supplement to March, 1927, A.B.A.J.

57. Cooley, *Constitutional Law* (4th ed., 1931) 428.

cedure. The only possible reconciliation of these conflicting aims of the separation of powers is to be found in a joint authority to prescribe rules.

History, logic, and sound policy indicate that the power to regulate procedure is neither legislative nor judicial. As Judge Cooley says:[58] "There are then powers strictly legislative, others strictly executive, and others strictly judicial; while still *other powers may be exercised by one department or by another, according as the law may provide. For illustration the case may be taken of rules for regulating the practice of courts which are sometimes made by the legislature and sometimes by the courts;* . . . And whenever a power is not distinctly either legislative, executive, or judicial, and is not by the Constitution distinctly confined to a department of the government designated, the mode of its exercise, and the agency, must necessarily be determined by law; in other words, must necessarily be under the control of the legislature."

But the control of the legislature does not extend to impairing the essential functions of the courts.[59] Numberless judicial opinions claim an inherent power in the courts to prescribe rules of court.[60] The same tribunals, however, frequently declare that the rules prescribed must be consistent with the statutory law.[61] A few recent cases have adopted Wigmore's view that the courts have exclusive control of procedure and can even abrogate procedural statutes by using the rule-making power.[62] Apparently no court has accepted Walsh's theory of the legislative nature of authority to govern adjective law.[63]

Inherent Rule-Making Power

Recognition of an implied or inherent rule-making power creates a problem concerning the judges who are to exercise the power. Evidently each trial court cannot undertake to set up a complete system of procedure for itself without loss of a desirable uniformity.[64] The court of last resort in each jurisdiction determines the common law for that jurisdiction and has the last word on the interpretation of statutory law. It should likewise have the determination of what the rules of court are to be in the lower courts of its jurisdiction.[65] Trial courts may adopt rules but subject to the requirements of reasonableness and consistency with the rules of general operation adopted by the court of review.[66] Thus by the more generally accepted view[67] the control of procedure is placed in the legislature, the appellate courts, and the trial courts—the authorities ranking in that order with the legislature at the top. The power of each may be freely exercised except when that exercise conflicts with rules announced by a higher authority. The other view—that the legislature has no power over court procedure—is gaining ground but has not yet played an important part in the development of the adjective law.

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Who Was One of the Three Judges in the
Ross Essay Contest

III

Exercise of Rule-Making Power by Courts

As the last century drew to a close James Bradley Thayer published his pioneering treatise on Evidence. In it he advocated that the mass of detailed, conflict-

58. Id. 49. Emphasis added.

59. *Ex parte Harker*, 49 Cal. 465 (1875); *Smythe v. Boswell*, 117 Ind. 365, 20 N.E. 263 (1888); *Jordan v. Andrus*, 26 Mont. 37, 66 Pac. 502, 91 Am. St. Rep. 396 (1901).

60. 110 A.L.R. 23 (1937).

61. Id. 35. Only in the instance of regulation of admissions to the bar has the conflict between rules of court and statutes been adjudicated in favor of the court rules. Gertner, *The Inherent Power of Courts to Make Rules* (1936) 10 Univ. Cin. L. Rev. 32, 48.

62. *Roberts v. Donahoe*, 191 Ind. 98, 131 N.E. 33 (1921); *Kolkman v. People*, 89 Col. 8, 300 Pac. 575 (1931). See also Kates, *A New Deal for Justice* (1934) 20 A.B.A.J. 148; (1937) 21 Journ. Am. Jud. Soc. 25.

63. Numerous decisions hold the delegation of rule-making power to the courts constitutional. (1931) 31 Col. L. Rev. 1185. Statutes "granting" the power to the courts have been passed by Congress and the legislatures of every state except Nebraska and Iowa. Gertner, supra n. 61, at 44.

64. The Constitution of Washington recognizes the danger and requires the judges of the superior courts to establish uniform rules. Art. 4, sec. 24; *State v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928).

65. See *People v. Callopy*, 358 Ill. 11, 192 N.E. 634 (1934). The precedent of the King's Bench, used by Dean Pound in argument in *The Rule Making Power of the Courts* (1926) 12 A.B.A.J. 599, 601, is hardly in point since our supreme courts are not comparable to the King's Bench. See Note (1935) 29 Ill. L. Rev. 911, 915. The argument sometimes made from express constitutional authority in the supreme court to supervise lower courts is also dubious. The constitutional provisions probably apply only to supervisory writs. The arguments of utility and power of review seem sounder.

66. 110 A.L.R. 51, 52 (1937). It has sometimes been suggested that the rule-making power exists only in courts of record. *State v. Call*, 39 Fla. 504, 22 So. 748, 749 (1897).

67. "Most reformers, however, less willing than Dean Wigmore to overthrow history and accepted doctrine, think merely that courts should expand their rule-making to cover all phases of court procedure, hoping that legislators will realize this is a subject which the courts can regulate better than they and keep hands off." Warner, *The Role of Courts and Judicial Councils in Procedural Reform* (1937) 85 Univ. Pa. L. Rev. 441. Pound concedes that the regulation of procedure is not a purely judicial power: supra n. 65, at 601. See also Morgan, *Judicial Regulation of Court Procedure* (1918) 2 Minn. L. Rev. 81, 92; *State v. Call*, supra n. 66.

ing, and confusing rules of evidence be changed and moulded by rules of court. He pointed out the special qualifications of the judges for this task, and discussed the opportunity they would have to improve the law by giving effect to fundamental principles, by recognizing the subordinate, auxiliary character and aim of the exceptional and special rules, by encouraging a more elastic procedure in shaping questions for the upper court.[68]

An investigation discloses that the courts have not followed his suggestion. No court has adopted a complete revision of evidence law, but the total of all the evidence regulations adopted under their rule-making power by the several courts in this country is quite large.[69] It can hardly be true that the courts have felt any doubt as to their power to deal with evidence, because almost every set of rules for trial courts contains a few dealing with witnesses and methods of proof. The subjects covered most often, are number of attorneys examining a witness,[70] affidavits,[71] depositions,[72] written stipulations,[73] discovery,[74] and authentication of written documents.[75] One of the most recent sets of rules was adopted in 1937 by the Supreme Court of Pennsylvania. Seven of the rules deal with evidence questions such as view of premises and order of proof. A far-reaching provision is that of Rule 10 in West Virginia, which authorizes the practice of taking the testimony of witnesses in open court in equity cases and provides that the rules of evidence shall apply to the taking of evidence before a commissioner in equity. Florida has rules dealing with the admissibility of carbon copies of any document and the admissibility of books of account.[76] The nearest approach that has been made to a fundamental revision of the law of evidence in any jurisdiction is made in the Federal Rules of Civil Procedure. These rules were adopted by the Supreme Court of the United States in December, 1937, the culmination of a campaign of more than twenty-five years by the American Bar Association.[77] It has been said that the simplification of evidence is one of the three chief characteristics of the Federal Rules.[78] Another writer speaks of the provisions concerning depositions and discovery as the key-stone of the new rules.[79] The admissibility of evidence is dealt with in a general provision, which is designed to modernize and liberalize the federal law in this field.[80] There are also important regulations concerning examination of witnesses and proof of official records. The equity and admiralty rules and general orders in bankruptcy promulgated by the Supreme Court of the United States also deal with evidence.

In England, as well as in America, evidence has been regulated to some extent by exercise of the rule-making power. Tidd's Practice cites two ancient rules of court dealing with the form and contents of affidavits and proof of documents.[81] The present English rules contain several orders dealing with similar subjects.[82] No one court has made a complete set of evidence rules, but the American and English courts as a group have adopted a large number of rules on the subject. Courts apparently have not hesitated to exercise the rule-making power in this field when it occurred to them to do so.

IV

Extent of Powers of Courts in This Field

The exercise of the rule-making power in the field of evidence by so many courts, is a strong indication that such exercise will be sustained if challenged. It is unlikely that the courts after adopting this large number of rules of court to govern evidence will decide that they had no power to do so.[83] In each of the jurisdictions in which rules have been prescribed a statute expressly grants the rule-making power.[84] In view of the frequency with which courts have expressed the opinion that the rule-making power is inherent, the statutes are probably not essential. Nevertheless they do serve one or more useful purposes. They may remove doubt in the minds of some as to the existence of the power in the courts, they may remove doubt as to what courts or judges are to exercise the power,[85] and they may enlarge the inherent power by giving authority to modify and repeal statutes. None of them use the word, evidence, and consequently there is no clarification in that direction.

Extensive Revision of Rules of Evidence Possible

No doubt the courts may do what they have not yet done, that is, use the rule-making power to revise the whole system of rules of evidence.[86] Largely designed to fit the peculiarities of jury trial this system is an anachronism in an age when juries are used in only a small proportion of contested cases. Even in trials before juries the system is not efficient. The need for

68. Thayer, *Evidence* (1898) 530, 534.

69. Fed. Rules of Civ. Proc., rules 26-37, 43, 44; Fed. Equity, r. 46 et seq.; Bankruptcy Gen. Order 22; Admiralty, rr. 30-33, 46; U.S. D.C. for Fla., r. 15, in admiralty r. 18, Arnow, Fla. Practice (1937) 337; for South Carolina, r. 148, 1 S.C. Code 1932 p. 1216; for N.C. rr. 7, 11-13, 30 Fed. Supp. XX; Ala., rr. 18, 33, 34 (1929) 4 Ala. L.J. 274, 284, 213 Cal. lxxxv, r. 9; 122 Fla. 881, rr. 6, 54, 55, 60-67; Ga. Code 1933, Sec. 24-3329, rr. 29-34, 40-42, 45, 53-57, 58, 59, 129 Me. 503, rr. 13, 16, 24-27, 35, 36, 130 Me. 527, rr. 2, 9, 16, 26, 27, 31, 40, 42, 129 Me. 526, rr. 13, 24, 25, 26, 35, 39; Mich. Comp. Laws, Mason's 1933 Supp., Appendix 1059, rr. 40-42; 2 Mason's Minn. Stat. 1927, p. 2121, r. 10; 4 Nev. Comp. Stat., 1929, p. 2474, r. 27; N.Y., Clevenger's Prac. Manual (1932) rr. 120-142, 161-163, 166; 200 N.C. 844; r. 4; 41 N.D. 712, r. 13; 332 Pa. St. Rep. xliv, rr. 201, 202, 219, 222, 223 (a) (1) (2), 224, 228; 26 R.I.v, rr. 18-21, 23, 27, 28; 1 S.C. Code 1932 p. 1241, rr. 14, 31, 34, 36, 43-46, 77; 104 Tex. 666, rr. 43; 116 W. Va. lvii, r. 6 (a), 10; Wis. Stat. (1937) secs. 270.025, 325.14, 327.2a.

70. Ala. r. 18; Fla. r. 59; Ga. r. 59; Me. r. 35; N.C. r. 4; N.Y. r. 161; R.I. r. 23; S.C. r. 31; Tex. r. 43; Wis. rr. 270.025, 325.14.

71. Cal. r. 9; Me. rr. 15, 16, 40; Minn. r. 19; S.C. r. 17.

72. Fla. r. 54; Ga. rr. 30-35; Me. rr. 23-25; Minn. rr. 26-28; N.Y. rr. 120-142; S.C. r. 34.

73. Fla. r. 6; Nev. r. 27; N.D. r. 13; Pa. r. 201; R.I. r. 28; S.C. r. 14; W. Va. r. 6 (a).

74. Mich. r. 41; N.Y. rr. 120-142.

75. Ga. r. 55; Me. r. 26.

76. Rr. 62 and 63.

77. See (1930) 55 A.B.A. Rep. 538.

78. Radin (1939) 25 A.B.A.J. 1010.

79. Pike, *The New Deposition-Discovery Procedure and the Rules of Evidence* (1939) 34 Ill. L. Rev. 1.

80. Rule 43. See supra n. 69.

81. (4th Am. ed. 1856) 494, 799.

82. The Annual Practice (1938) 2437. Ord. 30, r. 7, Ord. 37, r. 3, Ord. 37, r. 1, Ord. 38, r. 3.

83. Federal Rules of Civil Procedure 43 and 44 were adopted although the Committee indicated to the court, that it questioned its power to make a rule on evidence. See Draft, May, 1936, foreword xvii; Draft, April, 1937, rule 44, Note to Supreme Court.

84. Harris, *The Extent and Use of the Rule-Making Authority* (1938) 22 Journ. Am. Jud. Soc. 27.

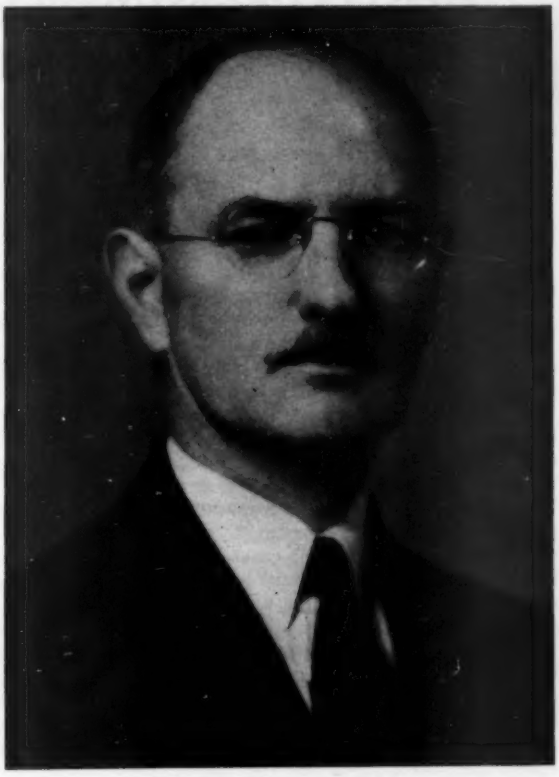
85. See n. 31, supra.

86. The Code of Evidence being prepared by the American Law Institute may prove suitable as a guide for such an undertaking. The following students of the subject either state or assume that the rule-making power extends to evidence: Thayer, *Evidence* (1898) 530; Wigmore, *Evidence*, 1934 Supp. 64; Morgan and Maguire, *Looking Backward and Forward at Evidence* (1937) 50 Harv. L. Rev. 909, 933; McCormick, *Tomorrow's Law of Evidence* (1938) 24 A.B.A.J. 507, 581.

revising the American law of evidence is now well recognized. Failure to keep abreast of the times and an insistence upon definite rigid rules of detail have made the system highly unsatisfactory. The legislature can partially remedy the first defect but would find difficulty in prescribing the details of a system that would result in reliance on general principles and judicial discretion. The way out of the difficulty is to allow the courts to set up a system of broad, general rules and administer it in such a manner as to advance rather than retard justice. Suggestions for changes in the system of evidence have been made by individuals, commissions, and bar association committees.[87] These changes can be accomplished with the least disturbance to the body politic by cooperation between the legislatures and the courts. The public may prefer to have legislatures decide whether to modify or abrogate the privilege for confidential communications, whether to change the rules concerning survivor's testimony, comment on the failure of the accused to testify, and burden of proof. These may be made the subjects of statutory regulation. A proper analysis of the opinion rule shows that it deals with form altogether. Therefore the courts should not hesitate to abrogate it by an exercise of the rule-making power. Almost any rule of evidence can be made to appear to involve substantive elements, if an exaggerated view of the importance of method is accepted. For example the supposed common law right to confrontation may be urged against drastic curtailment of the hearsay rule. But the purpose of such a rule is to increase the probability of a just verdict. The litigant can have no right in such a rule unless it does actually serve its purpose. The judges have the best opportunity to observe its operation and to determine to what extent, if at all, it serves the purpose intended. Most of the proposals for changes in the law of evidence can be made by rules of court[88] even in jurisdictions where courts do not have the power to abrogate statutory procedure. If there is any doubt of the power of the courts in any jurisdiction, the legislature should remove the doubt by passage of a confirmatory statute. The legislature may also assist by repealing statutes on evidence when they stand in the way of reform, in a jurisdiction where the courts have power to adopt only rules which are consistent with statutes. The struggle between judges and solons, which characterized the nineteenth century[89] and whose reverberations are heard in the twentieth,[90] should cease. Cooperation between legislature and court is demanded by the times.

Evidence a Proper Subject for Exercise by Courts of Rule-Making Power

The rules of evidence are designed to let the jury have only evidence that is as free as possible from the risks of irrelevancy, confusion, and fraud. Opinions will differ on the degree of success attributable to them. The judges are more familiar with the operation of the rules of evidence and are in a better position than legislator, to form a sound judgment of the value of the rules. For this reason evidence is a proper subject for rules of court. Courts change the law of evidence by decision,[91] and it is difficult to see any reason for denying them the power to reach the same result by rules of court. The few reported decisions are inconclusive.[92] On principle the highest courts in the states, and the United States Supreme Court, have inherent or implied authority to prescribe as rules of court, for trial courts under their jurisdiction, rules of evidence not in conflict with statutes. Rules of evidence prescribed under the rule-making power may even abridge statutes when the power to adopt rules with this effect has been delegated by the legislature. These rules should not abridge any fundamental right of litigants, but the courts should recognize only such rights in the law of evidence as are clearly established as substantive rights by constitution or statute or are essential to a full and fair opportunity of presenting one's case and of meeting the case of the opponent.



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87. *The Law of Evidence—Some Proposals for Its Reform* (Commonwealth Fund, 1927); Thayer, Wigmore, Morgan, Maguire, McCormick, supra n. 86; Report of the Section of Judicial Administration (1938) 63 A.B.A. Rep. 522, 525, 570-601.

88. One relates to scope of cross-examination. It has been held that a rule of court cannot deny a defendant in a criminal case the right of cross-examination. *State v. Bryant*, 55 Mo. 75 (1874). But surely the scope of cross-examination can be increased so as to allow leading questions concerning one's own case.

89. Holcombe, *State Government* (1926) 109-143.

90. McCormick, *Legislature and Supreme Court Clash on Rule-Making Power in Colorado* (1933) 27 Ill. L. Rev. 664; 9 Ga. Code Ann., 1939 Pocket Supp., Secs. 24-3301 et seq., 24-2628, Ga. Laws 1937, p. 464.

91. See *Funk v. United States*, 290 U.S. 371 (1933); *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625 (1914).

92. Note (1938) Wis. L. Rev. 324, 327; Warner, *The Role of Courts and Judicial Councils in Procedural Reform* (1937) 85 Univ. Pa. L. Rev. 441, 443. The rules which have been held invalid were adopted by trial courts. The desire to maintain uniformity may have been the deciding factor.

DEFAMATORY INTERPOLATIONS IN RADIO BROADCASTS*

By Lawrence Vold
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DURING a political campaign an outside speaker given access to the microphone in a radio address asserted of a candidate that he was a libertine, a madman, a fool, and a racketeer financially interested in police graft and gambling business. The address was read into the microphone from a manuscript which contained the defamatory utterances. The Supreme Court of Nebraska held that the radio station as well as the speaker was liable, applying the strict law of defamation which is applicable as a matter of course to other publishers, notably newspapers. Following this decision, other courts in other cases have applied the same position both to political and to commercial broadcasts of unprivileged defamatory utterances.

One summer the comedian Al Jolson, an outside speaker given access to the microphone, without warning orally interjected into a commercial advertising broadcast on a chain program the impromptu remark, "That is a rotten hotel," when a certain prominent hotel was mentioned. That remark was not found in the script which had been rehearsed for the occasion. The Supreme Court of Pennsylvania, announcing that in Pennsylvania, unlike other jurisdictions, the law of defamation depends on negligence, under these circumstances held the radio station not liable for the impromptu interpolation.

Radio Broadcasters and Other Publishers

In most jurisdictions, however, Nebraska included, the law of defamation does not depend on negligence but involves strict liability. The publisher of unprivileged defamatory utterances takes the risk whether careful or negligent. *Prima facie,* at least, the same basis for liability applies to radio broadcasting stations as is applicable to other publishers. Radio stations compete vigorously with newspapers for commercial advertising. Such advertising is often read into the station's microphone by the radio station's own announcer. Even where defamatory manuscripts are thus read by outside talent given access to the microphone, radio stations have the same sort of physical opportunity to check the manuscript for defamatory content that newspapers enjoy. So far, therefor, no serious reason appears for favoring radio broadcasters more than other publishers, or for sacrificing in their interest the victims of their defamatory publications.

Interpolations Without Warning

The contention has frequently been made in behalf of radio stations that the instantaneous character of radio transmission calls for the milder rules of negligence in cases of defamatory interpolations without warning. By itself, on its own account, however, that contention is without merit. Neither considerations of fairness between the parties nor of hardship on the radio station lend to it the slightest support.

In interpolation cases the outside speaker at the microphone is generally either inaccessible to the victim or is financially irresponsible. The victim in such cases is helpless. No exercise of care at the moment by the radio station operator can prevent the defamatory interpolation from striking the victim. At the moment, therefore, the radio station operator is equally helpless. Operators of radio stations are well aware from the outset, however, that when they broadcast the words of outside speakers admitted to their microphones they subject victims to precisely such risks. Whatever seeming hardship results to radio stations in applying the strict law of defamation in interpolation cases is balanced by at least equal hardship on the innocent victim who would be sacrificed if strict liability were denied. Moreover, it is not true of other publishers, such as newspapers, that even they always have the opportunity to stop publication of projected defamatory utterances. It is well settled in most jurisdictions that such publishers are answerable for the defamatory meanings reasonably understood by their readers or hearers in the light of facts known to them which the publisher had no means of finding out even with the use of the utmost care. The publisher takes that risk. It is not a question of negligence. Furthermore, the radio station operator can very readily avoid the hardship claimed. He can simply require adequate indemnity from the advertiser for whom he broadcasts as a condition to admitting the outside speaker to the microphone. The practice of requiring such indemnity is already well established.

Negligence Not a Necessary Element

Behind the contention for the milder rules of negligence in interpolation cases lies the tacit but unexamined erroneous assumption that negligence is the general rule of liability. In matters of unprivileged defamation, however, under ordinary circumstances, the stricter liability of the law of defamation is applicable. The greatly increased danger to innocent victims of unprivileged defamation that is involved when publication is by radio, moreover, strongly suggests that in the field of publication by radio the need for strict liability is not diminished but greatly accentuated. Here, of all places, those who by their own conduct create the risks and reap the commercial profits from the business of publishing ought also to bear the burdens which their conduct inflicts upon their innocent victims.

*A brief summary of the substance presented in an article with the same title, appearing in the *University of Pennsylvania Law Review,* January, 1940. The American Law Institute expressly disclaims any opinion on this matter: see *caveat* to sec. 577 and the last sentence of comment (f), sec. 581. Besides *Hulton v. Jones,* reference may be made to *Newstead v. London Express Newspaper Ltd.* [1939] 4 All E. R. 319.

PRACTICAL PROBLEMS OF ADMINISTRATIVE PROCEDURE: EVIDENCE*

Rules of Evidence Versus Relaxation—Firm Bases Required for Consistent Application

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ABLE and interesting discussions by leaders of bench, bar, and university have evidenced a weight of opinion to the effect that strict application of the rules of evidence in administrative hearings is neither necessary nor desirable. I follow thus far the testimony of Stephen, Seymour, Wigmore, Landis, Lobingier, and others. But I should like to add something wrought from the raw material of experience—the proof, as it were, of the administrative pudding.

More than ten years as a trial examiner has convinced me that relaxation of the rules of evidence is attended with difficulties if one is to follow the injunction in the *Bene* case (299 Fed. 468) and do it fairly. The practice of relaxation, like that of prevarication, demands a good memory. I don't like to depend on memory in matters of such a serious nature; neither do I like the other extreme, wherein I pause completely convinced by the argument of able attorneys that such-and-such is "best evidence" or "hearsay" and am confronted with the necessity of making a ruling which, viewed directly by the standards of logic and common sense, and by the circumstances of the proffer, appears to be unduly legalistic and unreasonable.

*These discussions are in no wise official but are the personal studies, observations, and conclusions of the writer, which are offered as practical means of meeting the reasonable requirements of quasi-judicial procedure.

Townsend Studio

PROF. LAWRENCE VOLD

Two Extremes to Be Avoided

There we have the two extremes: (1) arbitrary and unsystematic relaxation under the *Bene case* and (2) meticulous construction of the rules of evidence which tends to exalt them into independent rights which their propounders seek to employ for purposes such as obstruction, delay, and concealment of truth—purposes far beyond their legitimate use.

Confronted with these extremes at the beginning of my experience as a trial officer, I found it necessary to discard both. Neither was satisfactory. Relaxation to the point of receiving anything a good business man would consider, deprived me of any verifiable standard. The good business man of my imagination would reject a given bit of evidence at one hearing, and at another, after an argument by skilled practitioners, he would receive a similar proffer. My good business man was slippery. I could never catch up with him for checking; and when counsel would suggest that I had rendered a contrary ruling (when probably I had not), the situation would present difficulties. A further and very serious objection to indiscriminate relaxation is that it invariably involves the undue lengthening of records, a waste of time and expense, and a definite handicap to administrative procedure.

On the other hand, various experiences along the lines indicated above convinced me that the technical method was one which tended to exalt the process while minimizing the importance of the result. It was a large gilded and ornamented frame which rendered the picture inconspicuous—the frame, by the way, was often sold to clients at a very high price, with a resultant extra expense to the government. This frame tended to confuse and distort perspective rather than to clarify. The method invites the judge to look through the mirror of the opinions of other judges, delivered under other circumstances, and to avoid a direct view and a consideration of questions of evidence in the light of all the conditions of proffer and necessity.

Process v. Result

This, it is clearly seen, is not law, but a perversion of it. It is the method of the advocate seeking to bend the law to his purposes, using the *ex parte* law of lawyers and not the balanced law of judges. It attempts to set up inflexible rules to circumscribe the employment of measures of reasonableness and fairness, and to hamper the free application of principle and logic.

In short, the urgence of strict rule and of adherence to particular cases revealed itself as the method of the legal sophist. One is always able by the direct application of logic and fundamental legal principle to detect the presence of sophistry, but it is not easy on the moment to meet precedent with precedent.

My problem in these circumstances was not one of theory, but of practice—rapid practice, at that. I must rule on objections and motions consistently, fairly, without undue hesitation, and with due regard for fundamental rights and for the principles underlying the rules of evidence. This must be done under the conditions of administrative law which seeks to combine executive efficiency and thoroughness with fairness and reasonable legal restraint and in circumstances often rendered difficult by the obstructive opposition of counsel who strive to put the trial examiner in issue—a method employed with increasing frequency since *Morgan v. U. S.*, 298 U. S. 468, and similar cases.

Conditions of administrative procedure also involve issues such as competition, public interest, social and economic conditions, general understanding of terms, and the like, which necessitate inquiries of such breadth that they cannot be pressed into the narrow moulds of common law procedure. The question, then, was how to hold to the valuable standards of the common law and at the same time consistently enlarge the scope of their application?

Getting at the Foundation

The process of enlarging a building involves digging down to the foundation. I think this is the answer. The foundations, or underlying principles of the law, furnish sufficient support on which logic can build to meet our every requirement. We may leave the old superstructure of literal application, but we should not depart from the true intent and meaning of the law, for this is the solid foundation which meets our need.

Underlying all is the super-concept of justice. It supports all law that can endure as such. Justice is the law's perfect expression, and where supposed law, or contended law, is clearly inconsistent with the super-concept, it must give way. That is, we must discard it as not being law. And laws must be construed and applied by the measures of this super-concept as determined by logic, experience, and wisdom.

Adapting Legal Procedure

With these considerations in mind we may take the best from legal procedure and adapt it to our broader requirements. We may build up standards based on logic, legal principle, experience, and a guarded and frequently introspected sense of fairness, which produce ready decision and results that are much more satisfactory than those to be obtained by following the zig-zag course of doubtful precedents or by attempting to be a law unto ourselves through arbitrary relaxation.

The method here set out as evolved from experience may be in some slight respects a departure from some interpretations of the law; if so, the permissive decisions are adequate to protect administrative work. On the other hand, this method may be one of returning to the law and applying it directly according to its true intent and meaning and in the furtherance of its high objectives.

Definition of Evidence

From prior considerations, then, evidence may be taken to be *matter which has substantial inferential value bearing on the issues of the case, which possesses a reasonable degree of reliability, and which may fairly be received without transgressing any fundamental rights of the parties.* This breaks evidence down into something which must stand three practical and fundamental tests of

(1) *Logical relevancy* as determined by the processes of reasoning applied to the facts offered and their relation to the issues;

(2) *Reliability* as shown by the proffer and determined by law, experience, necessity, and the surrounding circumstances;

(3) *Fairness* as determined by the circumstances, nature of proffer, and the paramount considerations of fundamental right and "due process of law."

Probably nine-tenths of our decisions can be readily and correctly reached from a prompt checking of the matter offered with the three queries: Relevant? Reliable? Fair to receive? All exceptions to the rules are based on the substance of these, and we may enrich our concept of them by every valuable measure we have gleaned from law, reason, and experience. The facility of the suggested checking increases with the growing perfection of the concepts.

Relevancy, Reliability, Fairness

An exhaustive consideration, therefore, of the three tests, of relevancy, reliability, and fairness, would indicate that for practical purposes they include all essential features of the law of evidence. The purposes of the exclusionary rules have often been stated to be the prevention of fraud and perjury, of appeals to the prejudices of jurors, of the creation of false issues, of the introduction of unreliable evidence, of the casting of undue burdens of rebuttal on the parties, of depriving parties of fundamental rights, and of the unjustified introduction of unsworn testimony not subject to cross-examination. These objectionable results are readily seen to fall outside of any reasonable limitations of relevancy, reliability, and fairness. But these limitations are determined with due deference to such weighty considerations as necessity, difficulty of proof, special reliability, and all other features which reasonably operate to remove proffers from the limitations of particular rules but leave them within the field of competency determined by the tests.

The legal patchwork known as the law of evidence does not permit of an exact arrangement of its pieces by logical classification. Hearsay, for instance, falls within two categories of exclusion, for it is unreliable as lacking the sanction of an oath, and unfair as involving the denial of the right of cross-examination. However, all substantial features of the law are revealed by our cross-section to be included in one or more of the tests, and the correct application of the one is the substantial answer to the other.

Practical Applications

The practical applications summarized below are taken from more detailed discussions prepared for publication in book form. These are illustrative but not all-inclusive; for the direct method develops new applications as we continue to employ and perfect it.

(1) The purpose and necessity of going to the merits are paramount to other considerations except those clearly involving fundamental rights.

(2) Any material may be received in evidence which meets the reasonable tests of relevancy, reliability, and fairness.

(3) Fundamental rights must be clearly and substantially involved in order to effect the exclusion of relevant and reliable testimony.

(4) Rules of evidence and fundamental rights may not be successfully invoked for purposes of obstruction, delay, the concealment of fact, or for other purposes not within the proper objectives of the rules. Proffers must be in good faith and for the purposes stated.

(5) The rights of cross-examination, of introducing witnesses, and of making objections and motions, must be respected, but their abuse should not be permitted. Cumulative evidence should be rejected and witnesses should not be intimidated or harassed.

(6) Relevancy is determined by logic, or the processes of reasoning in the application of evidentiary material to the substance of the issues.

Reliability of Evidence

(7) Admissible reliability attaches to all relevant sworn testimony, to real evidence and written instruments when properly identified, and to all other material possessing a sufficient degree of trustworthiness to render its consideration reasonable. Reliability is evidenced by the nature of the material and the circumstances of its production and its degree is determined in accordance with familiar legal principles, sound judgment, and recognized business and official practice. It is usually a simple matter of common sense based on experience when approached in a truly judicial frame of mind. Secondary evidence is not reliable when unimpeached primary evidence is available. Admissible reliability extends to indirect evidence which is *res gestae* or other hearsay possessing a special degree of trustworthiness. Where issues are broad the principle of *res gestae* becomes correspondingly extensive.

Fairness

(8) Fairness as to material and the manner of its reception are determined by the reasonable requirements of fundamental rights in the light of the nature of the material offered, the interest of witnesses or parties, requirements of proof, possession by the parties of facts to refute or complete the information, objects for which material is offered or grounds for objections and motions, and other circumstances going to the presence or absence of good faith, reasonable objective, or prejudice to the parties.

(9) Considerations of fairness render it necessary to apply tests more strictly in the receipt of evidence from interested witnesses or coached witnesses, and in the receipt of self-serving documents, of fragmentary details where full disclosure is withheld, and of general statements and conclusions in the absence of factual bases. In short, rulings should tend to discourage all efforts to obscure or distort fact or effect undue advantage. On the other hand, liberality of test and ruling should be extended in the examination of witnesses favorable to the opposite side, whether it be on cross- or direct examination, and in the receipt of material against a party who is able to produce full and complete details.

(10) Fairness in the receipt of hearsay evidence should be determined from the presence or absence of substantial prejudice to the objecting party. Where fine points are raised, the question of prejudice might turn on whether or not the statements go directly to vital issues or to collateral matters or whether or not the collateral point is not denied or is within the power of the objecting party to disclose.

(11) Reliability and fairness attach to the receipt of records and memoranda regularly made in the due course of business, of factual data issued by the government, and of tabulations made from government or other reports and records where the supporting data is available to the opposite party. But where circumstances indicate a lack of reliability as to any of these by reason of their being based on self-serving statements or conclusions of partisan officials or parties, or from any other substantial reasons, the matter should be excluded unless the right of admission appears very clear through a complete compliance with 28 U.S.C. Sec. 695, or through other controlling considerations such as necessity, right of completing evidence theretofore received, and the like.

(12) The good faith necessarily involved in considerations of fairness are not present where inferior material is offered by one having better evidence in his possession, or where, having such better evidence, a party objects to inferior evidence shown to be the best his opponent could obtain. Good faith in all cases appears from the purpose of objection, motion, or proffer.

(13) On the question of prejudice in the receipt of material the following consideration may be determinative: relative importance, whether original or corroborative, whether inconsistent with contentions of the offerer or with evidence produced by him, or whether all the circumstances indicate proper purpose as against that of obstruction and opposition to complete disclosures of truth.

Privilege

(14) Fairness involves questions of privilege which must be decided according to law. No necessities of administrative law require relaxation of privileges arising out of the relation of husband and wife, attorney and client, and the like; but where the special statutes creating agencies grant immunity from prosecution elsewhere respecting matters testified to in such hearings, a witness may not be excused from testifying as to facts which would otherwise incriminate him or subject him to penalties. (F.T.C. Act, Sec. 9.)

(15) Rulings involving judicial notice and presumptions of law should follow the courts, those involving inferences of fact should follow logic. Anything generally known and practiced in an industry, or anything contained in codes or rules adopted and observed by the majority of an industry, may be judicially noticed in matters solely affecting such industry.

(16) Liberality of exclusion as well as of inclusion should be employed by administrative agencies in clear cases of obstruction or of attempts to obscure the facts.

(17) All decisions on particular applications of rules of evidence should be made with due regard to the principle of *cessante ratione legis, cessat ipsa lex.* (See *Manton v. U. S.*, 107 Fed. (2nd), 844, and cases cited.)

LAW OFFICE ORGANIZATION, II*

Office Records—Daily Time Sheet—Vouchers for Cash Paid Out—"New Case" Report—Partners and Juniors—Division of Work—Firm Meetings—Agenda—Cases Discussed—Bills and the Client—Difficulties of All Kinds Reported—Current Legal Decisions

By Reginald Heber Smith
of the Boston, Massachusetts, Bar

II. THE LAWYER'S WORK ON THE CASE

THE work for the client actually began at the first interview. At its conclusion and after the client has gone, the lawyer jots down appropriate entries on his Daily Time Sheet.

Daily Time Sheet

This sheet bears at the top the attorney's name and the date. It has horizontally ruled lines for convenience in writing. It is ruled vertically into five columns. In the first column the lawyer enters the name of the client and in the second the name of the case (that is necessary because the office is likely to have more than one case for the same client and every separate case must have its separate file, separate ledger for financial entries, and separate time ledger). In the third column (which is the widest) the lawyer enters a brief description of the work done. Abbreviations can be used and they save time. Thus LT means letter to and LF letter from, MT MF mean the same for memoranda, SL signifies study of law, PF preparation of the facts, CT.M. signifies a motion in court and CT.T. a trial, CW signifies conference with. Our lawyer, after the first interview, would enter "CW client." If he had no succeeding appointment and was able to start the case at once the entries might be "CW client re advisability of suit/TT Robinson [attorney for the defendant] CW Brown [an associate assigned to work on the case with him] MT Green [another associate of the lawyer's lawyer type whom he wants to start looking up a certain point of law] LT Jones [a witness whom he needs to talk with]."

The last two columns are narrow and here the lawyer enters the time spent on the case in hours and tenths of an hour. As the lawyer works through the day he enters the work he has done on all matters and puts down the time spent in hours and tenths. At the end of the day his Daily Time Sheet is collected and goes to Accounts. The abbreviated description of the work done on each case and the time spent is posted to the time ledger for that case. Then the columns of hours and tenths are added up and a record made of the total time worked by that attorney that day for clients. We use the hour and the tenth of an hour because it facilitates not only addition but other calculations that are described later. For convenience in figuring nothing surpasses the decimal system. At the bottom of the sheet two lines are left for entries involving work not for clients but for the firm or a member thereof. That work is not to be billed to a client but a record of it must be kept in justice to the man who has done it. This has also been entered in hours and tenths and is added up. The total of time for clients plus the total of time for the firm is the total production by that man for that day.

Vouchers for Disbursements

In connection with most cases there are apt to be money disbursements by check or by cash. A simple form of voucher is used giving the name of client and case (so that Accounts may post it to the regular ledger for that case), date, the amount, and the purposes of the expenditure. The voucher must be signed by the "responsible attorney" because he is responsible to the firm to see that the client ultimately repays the firm. If the client does not, then the responsible attorney himself does. This sounds like a harsh rule but it is highly efficacious. Lawyers are sometimes overoptimistic about a client or his case. Responsibility has to be placed definitely somewhere and the best place is on the shoulders of the attorney who knows the client. Every month Accounts gives to each responsible attorney a list showing all cash amounts charged against his cases. He may ask the client for reimbursement or he may decide to wait until the case is finished and is ready to be billed. There is, of course, a corresponding voucher for money received on account of a case.

For the encouragement of lawyers who fear that a system means their involvement in endless red tape, reports, etc., let us remark that we have already covered all but one thing that the lawyer has to do as his part of the system. He makes out a new case report, he keeps a daily record of his time spent, he signs vouchers for money disbursed or received. The last thing is that ultimately he will send out a bill and in that connection will sign a simple printed form asking Accounts to give him a time report and a cost report on the case and by a check mark signify whether this bill will close the case or is a bill on account. These are all the things and the only things he has to do. Everything else, so far as system is concerned, can be done for him. From these simple records, together with the ordinary financial records that any accounting department in any firm must have, can be built up a whole control system including cost accounting. The method will be set out in the third and fourth articles.

Partners and Juniors

Let us revert to the lawyers themselves. In a partnership there are partners. The younger attorneys on the staff who are not partners we call "juniors." There is an intermediate status called "junior partnership." As full partnership is a business marriage, so junior partnership represents the engagement stage. A junior partner has a guaranteed salary and customarily he is contractually entitled to a small share in profits but he has no share in the firm's assets and is not liable for its

*This series of articles began in the May number of the Journal.

debts. For purposes of contra-distinction (whenever it may be important) we call full partners "senior partners." Thus we have senior partners, junior partners, and juniors.

There seems to be a commonly held idea that a firm can make money by hiring bright young men at small salaries to do the work. That may be true in unusual circumstances but I believe it is definitely untrue as to most firms engaging in average general practice. Our records over many years show that the profits of the firm are almost entirely attributable to the partners themselves. Hence our hope is that every junior will grow up to be a partner and we do everything in our power to help him. In fact a great deal of help can be given. One senior partner is in charge of juniors. They confer with him about their work, their problems and troubles. In any group of men there are different types of personalities (this applies to partners as well as juniors) and there are an infinite variety of human equations. The junior coming out of a law school into the bustle of an active office is bewildered. The time it takes to get his sea-legs can be materially shortened by the good counsel of an older man who has himself been through the mill. Theoretically all older lawyers are glad to help their younger brethren; actually they are too busy. The problem of fitting young men smoothly into a going concern long vexed us. We have done better since we faced the problem and made its continuing solution a definite job for which a specific partner was responsible. It does not take very much time, but the partner who is in charge puts down his time on the bottom lines of his Daily Time Sheet. It is a charge, not against any client, but against the firm, and Accounts so posts it.

On every case except the simplest we like to have at least two men—generally one partner and one junior. This is good training for the junior. If one is away, or sick, or on vacation, and something comes up, there is then another man in the office having some familiarity with the case and he can act. He may need help but at least he has a general knowledge of the client, the case, and the background. This saves time. To a man who has worked on a case, the file is an open book; to one who comes to it cold the file is pretty much of a labyrinth.

Divisions of Work

Most cases can be broken down into component parts. This cannot be done with the scientific precision that Taylor invented for many industrial processes but it is feasible to quite an extent. There may be witnesses to locate and interview. That sort of "leg work" is hard on the older practitioner but fascinating for the younger. There are points of law to be pursued and perhaps briefed. A well-trained junior can do that. It may be a will to be drawn. The partner should personally receive the instructions from his client but the junior can block out the first draft. To the extent that the junior can be and is employed, the cost of the job goes down.

This process can be carried at least one step further. For years the best conveyancers here have used "title clerks." Precisely the same is true of assembling the material for income tax returns and it is true of a good deal of the routine attendant upon the probate of an estate. A trained clerk who, acting under the lawyer's guidance, devotes herself to such work becomes proficient and can care for many of the time-consuming details. Again the cost of the job goes down.

The "Firm Meeting"

Allusion has earlier been made to "firm meeting." As that is an integral part of the plan of organization and as it directly affects the way in which the lawyers go about their work, a statement concerning it is germane at this point.

After experimentation my partners have unanimously concluded that the place to hold firm meeting is not at a club but in the office and the best place in the office is the library. Also we are unanimous in concluding that the best time for such a meeting is in the evening when men are not subject to interruption as they are during the day. About the day of the week there has been a difference of opinion but the majority preferred Thursday so Thursday at 7 P. M. has become the settled date.

"Firm meeting" is a misnomer because for three out of the four meetings each month every attorney, not merely the partners but also the juniors, is invited and expected to attend. Furthermore every lawyer on the staff in turn is chairman of firm meeting. The youngest junior, when presiding, can call to order the oldest senior partner. It may be hard on the youngster but it is wonderful experience for him. The fourth firm meeting each month is limited to partners, and this affords an opportunity every month to take up such matters as are peculiarly their own affair or their responsibility, and this includes a discussion from time to time about how the juniors are getting on.

While all attorneys are expected to attend firm meeting there is no compulsion. No list of attendance is kept. Men come because they soon learn they cannot afford to miss it. Parenthetically it may be noted that in twenty years the weekly firm meeting has been given up only thrice, once in 1940 because of a blizzard, once in 1938 because of prostrating heat, and once in 1936 when the American Bar Association met in Boston. Since every lawyer in the office was at the convention, firm meeting was impossible.

The meeting lasts, on the average, an hour and a half. The agenda, after trial and error, has become established. First, anything pertaining to office organization or management may be brought up. While we were trying to work out a system a good deal did come up under this topic; but now there is very little. If some office rule has been changed, this is the time to state and explain it. Any new rule affecting organization can be discussed and then it goes to a vote with everybody present entitled to vote. The result is that the few disciplinary rules we have, have been adopted by the men themselves after discussion and vote. It is a very poor sport who will not comply with a rule of his own making. This method is at least democratic and if democracy cannot be trusted to work among a small group of well-educated men who are bound together by a community of interest, it is hard to see how it can work anywhere. Firm meeting, like Parliament, is a plenary session. It can do anything except amend the partnership articles. Some reader to whom this seems too Utopian may ask what would happen if all partners voted one way and all juniors the other. I think the candid answer is that the juniors would be asked to give way. Actually no such division has ever occurred.

Calling the Cases

The second item on the agenda is the calling of the new case list which has been prepared by Accounts and includes every case received since the previous meeting and up to 4 P. M. that day. Every case on the list is

called. If the youngest junior has a new case involving the collection of $50.00, which case he estimates to be worth $5.00, that case is called just as is every other case.

The responsible attorney gives a brief statement of what it is about. Then the firm tries to pool its brains and to give all the help it can. The point of law may be close to one involved in some other case in which a careful memorandum was prepared and is on file. The responsible attorney is given the reference. The defendant or his attorney may be known to another member of the staff. He may be able to give practical information. The general plan of campaign is considered. The aim is to carry out the "case system" that we all had at law school. It is done imperfectly but all of us do learn a good deal.

Bills

Next are bills. A partner, with the approval of another partner, can send out a bill at any time and without waiting for firm meeting. Men are encouraged, however, to send out bills only after discussion in firm meeting. It is essential to the success of any law firm that its bills to its clients be fair and that they be satisfactory. The best guarantee is to submit a proposed bill to the judgment of other men. They do not necessarily fix the bill but out of their experience they can generally offer some closely parallel situations and tell what charge was made. The rule is that after hearing the opinions of his fellows, the responsible attorney is entitled to have the final say. He may have been moved upwards or downwards in his mind but at least he has been given all the help of which the firm is capable.

Most lawyers that I know love to do the work for their clients but hate to send out bills. In fact they defer and procrastinate so much about rendering bills that a follow-up system is necessary and that will be described in the third article. The trouble is that legal services, with few exceptions, cannot be standardized. No two cases are exactly alike. The time necessarily spent, the responsibility assumed, the amount at stake, the skill required, the result—all these are variables. In arriving at a conclusion, the report on what it cost to do the job is an illuminating and steadying factor. The cost system is described in the next succeeding article. For the exact determination of a bill there probably is no perfect answer but I know of no better method than open discussion with one's partners and associates.

I have stated our rule that the responsible attorney has the final say so far as the firm is concerned. I should add our further rule that so far as the client is concerned he himself has the final say. The relationship between lawyer and client is confidential. It is absurd that at the end of the case when the bill is rendered lawyer and client should deal with each other at arm's length. A client should feel just as free to discuss a bill with his lawyer as to discuss the case itself. He is entitled to see the time records. Often he has no realization of all that has been done for him. Tragically enough, this is likely to be the situation where the lawyer has taken full responsibility, has made the decisions and not worried his client. The client sees an excellent result and assumes it came about by itself. In such instances where much work has had to be done behind the scenes we often give the client a carefully itemized statement showing what was done day by day. The time ledger sheet to which Accounts has posted all time by all men working on the case makes this possible.

Client Has the Final Say

The rule that the client shall be the final judge helps to meet the most awkward question that lawyers face. A client calls, states his problem, asks the lawyer to take care of him, and then says "what will it cost?" Verily the lawyer cannot tell, but this inability is disquieting to the client. If you ask an architect how much it will cost to build a house, he cannot give even an estimate until he has seen all the specifications. No client can give to the lawyer comparable specifications. For example, neither can then tell how much of a fight the opposing party intends to put up. If you beat him in the trial court and he accepts the verdict, that is one thing, but if he is determined to appeal, that is another. The best answer to the question "what will it cost" is the truthful one, "I cannot now tell you. I can tell you that we keep careful records, these you can see, we have a cost system, when the work is done we will submit a bill we believe fair. You must feel free to discuss this with us if you want. You are not letting yourself in for an indeterminate liability because our rule is that you yourself have the right to fix the bill."

That rule means exactly what it says. The client can fix his bill. Barring cases of fraud which are covered by the Canons of Ethics we do accept the client's decision. If we feel he is being unfair, then we respectfully decline to accept further work from him. Most clients are honest, they are prepared to pay for good work and do pay, but they do not want to get "stuck." Candor and openness go a long way with nearly all clients.

This much space has been devoted to the matter of bills because after all it is the make or break for any enterprise that must pay its own way. A system must give to the lawyer promptly and accurately all the relevant statistical data that can be made available. It is not enough to say that a bill should be fair or that we want it to be fair. The lawyer has the duty to do everything in his power to arrive at what is fair. The best approach is through good records and discussion in firm meeting.

Trouble, and How to Meet It

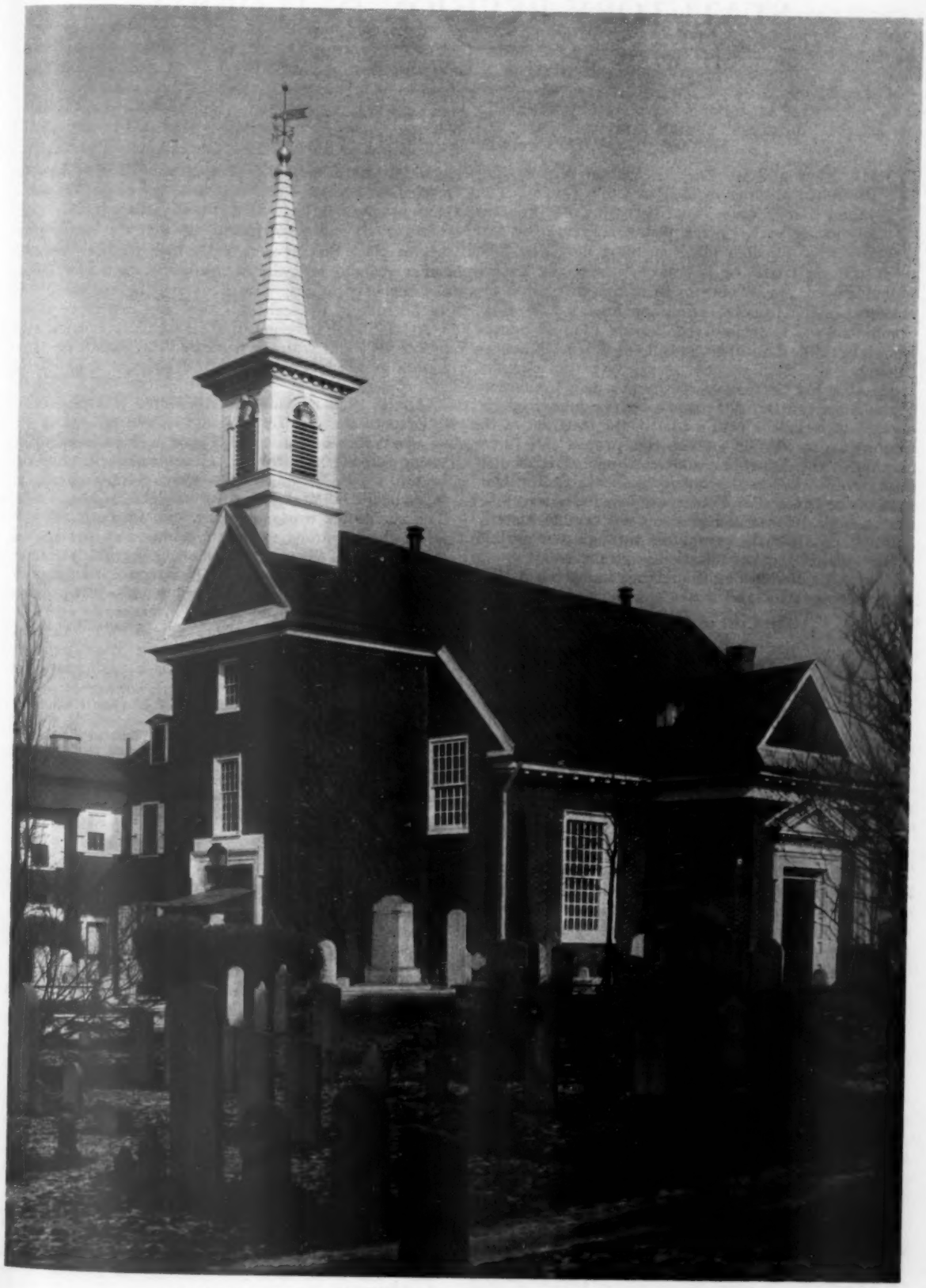
Next on our agenda is "Trouble." If a man has made a mistake, now is his time to tell about it. Perhaps other men may help him to repair his error of commission or omission. In any event his mistake may be a warning that will prevent another member of the staff from falling into the same trap. Rules of procedure, for example, with their time limitations for doing this or that, are necessarily arbitrary. They are hard to remember and they are changed from time to time. Everyone of us has been tripped up. The painful experience should be shared. Men feel an understandable reluctance, but by having a definite item on the agenda they are encouraged to a confession and thereafter feel infinitely better.

Reading the Advance Sheets

The next to the last item is "Decisions." During the week different men have read the advance sheets in the standard reporting systems. Those men meet and discuss the decisions that seem to them important. A short abstract of each case is prepared, written out, copies are typed and circulated through the office. Originally the abstracts were read orally at firm meeting, but it is our experience that most men learn more from reading an abstract than from listening to it.

The last item is "Various." The chairman calls each

(*Continued on page* 502)



GLORIA DEI—OLD SWEDES CHURCH, PHILADELPHIA

STATUTORY REVISION IN FLORIDA

What a Few Young Lawyers Accomplished

By Lewis H. Tribble

Revisor of Statutes, State of Florida

THE Florida State Bar Association was holding its annual meeting in 1937 at Coral Gables. The Junior Bar Section was discussing its program for the ensuing year. Some young lawyer arose and suggested from the floor that something should be done about the high cost of law books, especially to the young lawyer. As an outgrowth of this discussion the president of the Junior Section appointed a Law Book Committee which devised the Florida Plan of Statute Revision, Bill Drafting and Legislative Reference Bureau.

The Florida Section of the Junior Bar Conference of the American Bar Association became interested and decided to make the plan a part of the program of the Conference in Florida and on this project the Junior Section of the State Bar and the Junior Bar Conference have worked as one organization, the State Chairman of the Junior Bar Conference being also a member of the Law Book Committee. Considerable material was gathered for the committee through the medium of the Junior Bar organization over the country. In addition, the Junior Bar Conference has given its continued cooperation and active assistance.

High Cost of Statute Books

The committee met at a subsequent date, and after canvassing the whole field decided to attack the problem of the high cost of the Florida State Statutes. These statutes had been compiled and published by a private concern. The cost for a complete set, including six volumes of statutes, six supplements and a loose-leaf service, was $175.00. (Since that time an additional bound supplement has been published, making the total cost to purchase a new set $202.50.)

The committee had heard that other states were able to publish their statutes for a cost from $5.00 to $15.00, and decided to investigate and find out from these states how it was possible to publish statutes at such a low cost. After a thorough investigation it was determined that the continuous revision plan as exemplified by Wisconsin[1] was the most modern, efficient and inexpensive.

The committee reported its findings to the 1938 convention and it was voted that the 1938 committee continue the study from the constitutional and legal point of view and draft proper legislation concerning revision for introduction in the next session of the Legislature.

After further study of the statutes of other states and of the Legislative Research Bureaus[2] in the various states, it was determined that it was advisable, insofar as Florida was concerned, to combine the work of revision of statutes with that of a legislative reference bureau, thus cutting the cost to the state.

Revision of Statutes

In order to be assured that the Legislature would look favorably upon the plan, it was deemed best to proceed in two steps rather than to try to put the complete program through at the next meeting of the Legislature. It was also determined that the better plan was to place the revision under the Attorney General rather than to seek the establishment of a new office, Reviser of Statutes, thus avoiding the criticism that the bill sought to establish a new and expensive office.

At the 1938 meeting the Junior Bar Section had proceeded so far with the work that the State Bar Association as a whole approved and adopted it as one of its projects.

At the 1939 meeting the committee was authorized to prepare the bill[3] to present to the Legislature and to work for its passage. There were a number of young attorneys, members of the Junior Bar Section, in the 1939 legislature who were enthusiastically in favor of the bill and gave their wholehearted assistance. The committee worked quietly and diligently, so that when the bill came up in the House not a vote was cast against it, the committee having previously secured the approval of the judiciary and appropriation committees. It passed the Senate with only two negative votes and was approved by the Governor.

After the bill became a law the Attorney General, recognizing that it was the work of the State Bar Association, and particularly its Junior Section, and that

1. Wisconsin Plan of Statute Revision, E. E. Brossard, American Bar Assn. Journal—May, 1924.

2. For a description of the work of a Legislative Reference Bureau see "A Law Making Laboratory" by Edwin E. Witte, *State Government*—April, 1930.

3. Section 1. The Attorney General of Florida is hereby directed to formulate a definite plan for a complete revision, compilation and consolidation of all the General Statutes of Florida in force, of a permanent nature, and for the order, classification and arrangement of said Statutes; and said Attorney General is hereby authorized and directed to prepare, in time for submission to the Legislature of 1941, such complete revision, compilation and consolidation, in one volume if practicable, duly indexed, of all the General Statutes of Florida in force, of a permanent nature. Where in the opinion of the Attorney General a general statute is of such limited or local application as to make its inclusion impracticable or undesirable he may omit such statute from this revision but shall include an appropriate reference to such statute.

Section 2. That, after said Statutes shall have been revised, compiled, and consolidated, the Attorney General shall contract for the printing and temporary binding of an unannotated preliminary edition thereof, in sufficient number of copies for distribution, before enactment, to the members of the Legislature; and said Attorney General shall, at the same time, if practicable, contract for the printing and binding of the permanent edition thereof to be printed and bound after enactment, in sufficient number of copies to supply the anticipated demand therefor. If practicable, contracts for printing shall provide that the State shall own the plates or type used in printing the preliminary or permanent editions of said statutes for such further use as may appear desirable. Copies of the permanent edition of said revision and of the annotations shall be furnished all members of the Legislature and all officials and agencies to whom copies of the Acts of the Legislature are now directed to be furnished by statute, and copies thereof shall be sold to the public at a price to be fixed by the Attorney General, not less than the cost per volume of the printing thereof, the proceeds therefor to be paid into the general revenue fund.

Section 3. The Attorney General shall place before the Senate and House of Representatives of the Legislature of 1941 a certified copy of the preliminary edition of said Statutes together with a suggested form of a proposed bill enacting the same; and at the same time shall call the attention of the Legislature to,

the Bar should be consulted with respect to the best way of carrying out the Act, called in conference the Law Book Committee, which by this time had become a combined committee of the Florida Bar Association and the Junior Section, and the officers of the Florida Bar Association and the Junior Section. At this conference it was definitely determined to make a revision of all the General Statutes of Florida as provided by the Act and not to try to do any topical revising as the time was too limited to allow complete rewriting of particular fields of the law. Thus a proper foundation would be laid for continuous revision and the establishment of a legislative reference library.

Appointment of Chief Revisor

The conference canvassed the field as to whom to select for the position of chief revisor and the assistants. The Attorney General agreed that he would appoint only men who met the approval of the committee. After the men were selected it was decided that the chief revisor and his associate should proceed to Wisconsin to study the manner in which the revisor's office of that State was handled. This was done, the men remaining in Wisconsin for a period of two weeks and then proceeding to Kentucky because that state was also following the Wisconsin plan and had been working for approximately six months.

The revisors returned from this trip and completed setting up the office in Tallahassee. They will be ready to present the revision to the next session of the Legislature, which meets in April, 1941.

(a) All changes in substance made in the text of any statute;
(b) All general statutes, or parts thereof, in effect, of a permanent nature, omitted from the revision, and the reasons for their omission;
(c) All statutes consolidated with other statutes;
(d) All new matter added to the revision, and the reasons therefor;
(e) The manner in which he may have reconciled conflicting statutes.

Section 4. The Attorney General is hereby authorized and directed to prepare, or by contract with some first-class law book publisher having an efficient law editorial staff to have prepared, a complete annotation, in one separate volume if practical, of said revision of the statutes above mentioned, the Constitution of the State of Florida, and rules of Court.

Section 5. That the Attorney General may include in the permanent edition of the revision, compilation and consolidation of said statutes, or the permanent edition of annotations, the Constitution of the United States and the States of Florida, rules of Court, important opinions of the Attorney General, and such other helpful tables, information and useful matter as the Attorney General shall determine is desirable and practicable to be included.

Section 6. That the Attorney General is authorized to employ skilled assistants for the purpose of performing the duties imposed upon him by this Act.

Section 7. That the Attorney General, through the staff employed for the handling of the duties imposed upon him by this Act, shall make research of Legislative matters at the request of members of the Legislature of Florida, and shall aid the members of the Legislature in the drafting of proposed legislation.

Section 8. That the sum of Twenty Thousand Dollars ($20,000.00) per annum is hereby appropriated out of the general revenue fund of the State, to pay the cost of preparing said revision, compilation and consolidation of the statutes, and the annotation thereof, and the performance of the other duties imposed upon the Attorney General hereunder. That an additional sum sufficient to pay the cost of printing and binding of the preliminary and permanent editions of said statutes is hereby appropriated out of the general revenue fund of the State.

Section 9. This Act shall take effect immediately upon its becoming a law.

(Chapter 19140, Acts 1939.)

Combining with Legislative Reference Bureau

The second step necessitates additional legislation, providing for the setting up of the revision work on a continuous basis and combining with it a legislative reference bureau and bill drafting department, all of which will continue to be under the jurisdiction of the Attorney General. In this respect the Florida plan differs from that of Wisconsin.

The great weakness of bill drafting is that the office force of the Legislative Reference Bureau is increased during the short meeting of the Legislature. The employment is temporary and uncertain and the draftsmen have had little experience in writing statutes. Under the Florida plan this weakness in bill drafting will be cured. The experience gained in revision work will increase the draftsman's knowledge of the entire field of statutes and the practice in legislative drafting would be valuable in the preparation of revision bills. The experience thus acquired would improve the product and increase the output per man because of greater efficiency. Furthermore, the need of subsequent revision would be lessened.

Legislative Library

When the present preliminary work has been completed, the basis of a legislative library will be available. There will be complete, readily accessible card index files of all the session laws contained in the general session acts from the 1920 revision to date. In addition, all the special acts will be card-indexed and filed according to subject matter, counties, cities, districts, etc. These files will all be part of the permanent records of the revision department of the Attorney General's office. With these valuable records before them, the revisors will be in a position to advise the legislators and the bar concerning any law, general or special, in Florida. Research can easily be made on the question of whether a proposed bill duplicates existing law or is contradictory.

The annotations will be published in a separate volume. It will not be necessary to publish this volume more often than once every ten years. Subsequent annotations will appear in the biennial editions of the statutes until such become so bulky as to require a new publication of the annotations edition.

Cost of New Book of Statutes

Wisconsin sells its general statutes for the sum of $5.00. It is believed that Florida can sell its revision for approximately the same amount. Florida has a law requiring that all state printing be done in the State of Florida and this law may cause the statutes to cost a little more than they do in Wisconsin.

If the complete program of the Florida Bar Association is carried out by the next legislature, the authority of the Attorney General as revisor of the statutes will be made continuous. Topical revision will be done carefully and minutely through the years. The statutes will be revised after each biennial session of the legislature. Repealed and obsolete statutes will thus be deleted as soon as repealed or made obsolete. The statute law will always be down to date and will not grow in bulk, nor become hopelessly confused. The young lawyer will be able to place on his shelves the General Statutes of Florida and the Annotations for approximately $15.00.

Thus the young lawyer who spoke of the high cost of law books at the 1937 convention will have his complaint answered insofar as the price of the Statutes of Florida are concerned.

AMERICAN BAR ASSOCIATION JOVRNAL

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A USEFUL BEQUEST TO THE ASSOCIATION

Again the bequest in the will of the late Judge Erskine M. Ross has enabled the Association to bring about a notable contribution to the literature and source material of an important and timely subject. This year's Ross Essays dealt with the subject, selected in San Francisco last July—

> "To What Extent May Courts under the Rule-making Power Prescribe Rules of Evidence."

Those interested in improving the administration of justice have found that this phase of the rule-making power has many ramifications as well as deep implications. Assembly and analysis of the statutory and decisional law along with other source material are invaluable. Efforts to formulate a constructive and practicable answer to the submitted problem are bound to be of keen interest to students of jurisprudence The wise benefaction of Judge Ross and the resultant prize have enabled the American Bar Association to enlist many of the best minds of the profession of law in these tasks.

Upon the recommendation of an award committee made up of Former President Ransom of the Association, Supreme Court Justice William O. Douglas, and Dean Robert S. Stevens of the Cornell Law School, the Board of Governors has bestowed the 1940 prize of $3,000 on Professor Thomas Fitzgerald Green, Jr., of the University of Georgia, who has been a member of the Association since 1934. Hearty congratulations go to him as the worthy recipient of one of the outstanding honors of the profession. There were thirty-six essays submitted for this year's competition—not as many as in some other recent years—but a considerable number of the essays are, as usual, of high merit and value.

Aside from the distinction achieved by the winner in joining the galaxy of those who have received the Ross award, the significance and utility of the competition are reflected in the essays which are thereby added to the literature and source material of the subject. As heretofore, this gain is not limited to the winning essay, which is published in full in this issue of the JOURNAL. At least several others of the submitted essays are of high merit and constitute valuable discussions of the subject, from differing points of enlightened view. The patriotic purpose of the founder of the prize is furthered by their publication, in subsequent issues of the JOURNAL. The sequence of such publication is without significance as to any relative merit of the essays. There has been no ranking or relative rating of the essays, beyond the selection of the prize winner. Nor is it practicable to publish anywhere near all of the essays which might merit publication. A number sufficient to assure a representative and significant symposium is being chosen.

An interesting aspect of many of this year's essays is the extent to which, in their documentation, previous essays in the Ross competition, in fields bordering on the present subject, are cited and utilized as authorities, as indeed they should be. Fresh confirmation is given also to the fact that the files of the JOURNAL and the bound volumes of the Association's Annual Report constitute the foremost sources of materials for any studies affecting the administration of justice. The 1940 essays confirm also the extent to which the thinking and outlook of the profession have been and are affected by the studies conducted during the Association year 1937-1938 by the Section of Judicial Administration. For many years to come, scholars and men of action will alike turn to the 1938 Report Volume of the Association, for information, inspiration and expert guidance, in projects for improving the administration of justice. Nothing can lessen the authority or the usefulness of the monumental labors of that year.

CONSOLIDATING THE GAINS

Again, as at frequent intervals during the past eighteen years, announcement is made of adoption by a state of the two years college requirement as a pre-requisite to bar admission, in addition to law study. This time it is Ken-

tucky, and the announcement is made by the Court of Appeals, which has just promulgated a rule to this effect. The narrowing group of those jurisdictions which are content with a less thorough education is now reduced to seven: Arkansas, Georgia, Florida, Louisiana, Mississippi, Oklahoma, and South Carolina. The first two have no requirements of education or training except such as may be demonstrated by the passing of a bar examination.

The Abraham Lincoln argument that any college requirement would result in barring the poor boy has been thoroughly refuted in states from coast to coast where under such a rule the new membership in the bar has continued to represent all classes, and is as democratic as it ever was. However, this discredited doctrine still has advocates in a handful of states where it is making a last stand. Whenever it is advanced, the "right" of the individual to be admitted to the bar is stressed instead of the paramount consideration of the public welfare which demands adequate training for those who are allowed to hold themselves out as qualified to practice law. In contrast, nothing is heard of the right of one not thoroughly qualified to practice medicine at the risk of the patients.

We are sometimes inclined to forget that this progress was something which did not merely "happen." The American Bar Association, under some of its greatest leaders, undertook this program in 1921. The boldness of the step can be measured by the fact that at the time but one state, Kansas, had a two years college requirement. However, already a similar campaign by the medical profession had been successfully launched and it was realized that nothing could be more important to the future of the bar or a more appropriate work for the American Bar Association. With the accession of Silas Strawn to the Presidency in 1927 added impetus was given to the program by the appointment of a full-time adviser with a substantial appropriation with which to carry on a nation-wide campaign. Part of the work included an inspection of law schools and a classification of them as approved or unapproved in accordance with whether or not they met the standards laid down.

For thirteen years this work went on, with the continuity of purpose and program which can only be achieved through a permanent full-time official. The results speak for themselves. Not only have all but an insignificant number of states adopted the two years college rule, but also in the hundred and two law schools on the Association's approved list there are now two-thirds of the law students in the United States.

Occasionally talk is now heard among the uninitiated that the work of the Section is done and that the money given to it for so many years should now be devoted to other purposes. This comment is wide of the mark. The work is not done. In fact, with the increase of approved schools and the addition of the widely commended program of legal institutes, it has greatly increased. And there are still over twelve thousand students obtaining their legal training in schools which the Association and half of the states of the Union regard as not good enough to entitle them to take the bar examination.

Indeed, from now on the work of the Section will be increasingly difficult. Those more amenable to persuasion have been convinced. The die hards must now be dealt with. This can be adequately done only with the aid of a full-time adviser. Unfortunately the financial condition of the Association does not at present permit of the employment of such an adviser. Temporarily the task which should be his is being carried on by certain members of the Council of the Section. These men can not be expected indefinitely to make the great sacrifice of time and effort which this entails. They have other pressing duties.

The Board of Governors has recently recognized the gravity of the situation by formally going on record in favor of the employment of a full-time adviser. It is hoped that means will soon be found to supply this admitted need. The splendid contribution which the Association has made to a better qualified bar should be followed up.

LAW INSTITUTE GOES ON

It is good news that adequate financing is available for the immediate future of the American Law Institute. The Institute's good work has amply justified the support given to it for eighteen years by the farsighted generosity of the Carnegie Corporation.

There is yet much work to do. Real Property, Evidence, the Youth Court Act, the rest of Security, are unfinished; Judgments are on the list for immediate treatment, and rising on the Institute's horizon are the law of Associations, the law of persons, the rule against perpetuities, and covenants running with the land, and mortgages on real property. These great fields by no means exhaust the sphere of Restatement of the Law. One is tempted to imitate Coke in his irresistible impulse to play upon words, and to quote his own sentence,

Nihil perfectum est, dum aliquid RESTAT *agendum.*

When the Chief Justice of the United States told the American Law Institute that its spontaneous greeting warmed his heart, he reflected what was in the hearts of the whole assembly.

HAIL AND FAREWELL

Elsewhere in this issue of the JOURNAL we print a biographical sketch, with a picture, of our new Managing Editor, Urban A. Lavery, to whom we extend warm greetings and best wishes for his and our success. Mr. Lavery will assume charge on June 1.

For seven months, beginning upon the retirement of Mr. Taylor last November, and ending with the present (June) number, one of the associate editors has been in charge of the JOURNAL, under the editor in chief. Gratitude is hereby expressed for the indulgence of readers and the friendly cooperation of all parties concerned.

PRIVATE UNAUTHORIZED "COURTS"

IN the May Number of the JOURNAL, page 427, the Committee on Professional Ethics and Grievances noted that

> "The indiscriminate use of the term 'Court' is thought in New York to have become a menace to the public; it has frequently been used on the radio and otherwise in a manner calculated to mislead,"

and reported the introduction of a bill in the New York legislature prohibiting such misuse.

A recent case in the Supreme Court of New York, *In re Blake,* 17 N. Y. S. 2d 496 (decided Dec. 18, 1939) illustrates the evil. The opinion of the court (Judge Wenzel) reads as follows:

"This is a motion to confirm the award of the 'Jewish Court for Peace and Justice' in an alleged arbitration between the plaintiff and the defendant herein. The arbitration was instituted on request of the plaintiff to the "Jewish Court," who, by mail, requested the defendant, who lived in Bethel, New York, to appear. He sent his twenty-year old daughter to New York City to investigate the claim being made against him. On her first visit she was unable to find the "court" for the reason that its only office or court room was in the broadcasting station on Second Avenue, Manhattan. On her second visit, in response to another letter, she was prevailed upon to sign an agreement to arbitrate, which was, of course, not binding on the defendant, first, because there was no proof of the agency of this girl to sign such agreement, and secondly, because of her nonage. Why this agreement to arbitrate was not sent to the defendant himself in one of the communications of the 'court' to him does not appear. Perhaps it was because it would have disclosed the true nature of the 'court,' whose high-sounding title was doubtlessly intended to impress the ignorant and gullible and to lead them to believe it possessed some power or authority to compel attendance. The agreement having been signed by the daughter of the defendant, she was led into the broadcasting room where the plaintiff, before a microphone, made his charges and she was permitted to make reply. It is not shown that she knew anything of the controversy. No opportunity was given for the production of witnesses. Anyone who has ever listened to one of these "trials" on the air knows the sketchy character of the testimony, the impatience of the master of ceremonies, and even the arbitrators, due to the exigency of the shortness of the time allotted for each trial. Under such circumstances it is alleged justice was done. In this instance an award was made to the plaintiff of $100. The defendant opposes the confirmation of this award on the grounds, first, that he did not consent to the arbitration; secondly, that he was not given a hearing; and thirdly, that the manner and nature of the trial was not conducive to the rendition of a just verdict.

"The defendant's points are well taken. Protestations to the contrary, one would have to be very naive to believe that the producers (perpetrators might be a better word) of this program were not more interested in showmanship and the amusement furnished the listeners than the rendition of justice. I have listened to a number of such programs on the air, and the ignorance of those in charge of the commonest principles of law was appalling. Atrocious advice has been given to poor ignorant people which could serve only to multiply the trouble they have brought to these mountebank 'courts.' In the beginning a few men learned in the law permitted themselves to be used in connection with this 'swing time justice' until they realized the iniquity of the scheme. Today no judge or self-respecting lawyer will lend himself to the capitalization of human misery. Outstanding members of the laity, flattered by the temporary prominence given them and fancying themselves no little in the role of a 'Solomon come to Justice,' serve in capacities for which they have no qualifications or training. Certainly, no good is accomplished for the poor litigants who are beguiled into making their troubles entertainment for the world, and assuredly, much harm is done. These 'courts' have no ability, no responsibility and no authority, and should, as a matter of public interest, be discouraged.

"The motion to confirm is denied."

Law Office Management

(*Continued from page* 496)

man in turn. This is his chance to tell briefly the most interesting event in his practice since the last meeting. This is not obligatory and not all men respond every week but the majority do.

It will be realized that through attendance at firm meeting every man gets a fairly good picture of what is going on in the whole office. As new cases come in he hears them discussed, week by week he hears the high-lights of what his partners or associates are doing, when a case is finished he learns what was accomplished in connection with the discussion about the bill.

Even more important, firm meeting has a cementing influence that helps bind all members of the staff into an harmonious team. Lawyers are human beings. In any firm, large or small, there is a real danger that busy men, preoccupied with different problems, may grow apart and lose touch with each other. Firm meeting brings them together, face to face, for the discussion of common problems. Men come to know each other better, they have a chance to perceive and respect one another's capabilities. Friendships are deepened. Firm meeting has a very great integrating power.

(*To be continued*)

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Power of Federal Trade Commission to Discipline Attorneys Challenged

IN a discussion of a recent amendment to the rules of practice of the Federal Trade Commission in the New York State Bar Association's Service letter, the power of an administrative agency to discipline an attorney was questioned.

The amendment directs the commission's trial examiner to note on the record any disregard by counsel of his rulings, and, where he deems it necessary, to make a special written report of the incident.

The rule provides that "In the event that counsel for the commission or for any respondent shall be guilty of disrespectful, disorderly or contumacious language or conduct in connection with any hearing, the trial examiner may suspend the proceeding and submit to the commission his report thereon, together with his recommendations as to whether any rule should be issued to show cause why such counsel should not be suspended or disbarred pursuant to Rule IV or subjected to other appropriate action."

It also provides that a copy of the examiner's report shall be furnished to counsel and that disciplinary action will be taken only after an opportunity for hearing has been given.

The service letter says: "The adoption of this rule raises the question whether a trial examiner or a member of the commission should possess the power to discipline members of the bar.

"Under the Federal Trade Commission Act neither the members of the commission nor the trial examiners are required to be members of the bar, nor are they in any sense of the word to be regarded as judges. While no one should condone an attorney's language or conduct which is disorderly, it is open to serious question whether any layman, or, for that matter, any fellow-member of the bar, should be empowered to discipline an attorney for language which the former considers 'disrespectful.'

"An attorney is often required to defend the rights of his client with vigor. Such vigor may easily be deemed disrespectful by a prejudiced trial examiner or commissioner. Reference may be made in this connection to the recent opinion of the Circuit Court of Appeals for the Seventh Circuit in the case of Inland Steel Company v. National Labor Relations Board, where the conduct of the trial examiner was found to compare most unfavorably with the conduct of counsel."

Mr. Referee, How Could You?

MEMORANDUM BY THE COURT.

"The recommendation of the learned Official Referee cannot be accepted. The proof clearly establishes that respondent, who was admitted to the Bar in 1926, was guilty of (1) subornation of perjury; (2) wilfully misleading the District Attorney of Westchester County in his efforts to locate one Sanders, who had been associated with respondent; (3) fraudulently exaggerating claims in complaints and bills of particulars; (4) destroying files of cases and financial records in an endeavor to thwart this court's investigation; (5) wilfully occupying a dual and inconsistent professional relation in a negligence case; and (6) paying persons for soliciting retainers for him in negligence claims. The respondent has shown himself unworthy of the privilege of engaging in the practice of the law and must be disbarred.

"The respondent is disbarred and his name ordered to be struck from the roll of attorneys."

In re Osofsky, 18 N. Y. S. 8, 9.

Repeal of the Louisiana State Bar Act Under Consideration

The Louisiana State Bar Association is to consider repeal of the "Huey Long State Bar Act." The executive committee of the association has already gone on record as favoring repeal of the legislation, which had the effect of making the bar an adjunct of the Long machine. In a resolution proposing repeal, the executive committee declared its effect has been to weaken, if not destroy, the constitutionally granted and inherent power of the Supreme Court to control admissions to the bar and to discipline the membership of the bar, and the repeal of said act would restore this power to the Supreme Court, free of any semblance of legislative interference or usurpation.

The resolution also declared that experience has demonstrated that the act lacks the support and approval of the profession as a whole, and that it is unworkable and inefficient in practice, and added:

"The members of the bar of this State have never had an opportunity to determine whether they are in favor or not in favor of an integrated or incorporated bar and should be granted this opportunity.

"If the majority of the members of the profession favor the principle of an integrated or incorporated bar, such integration or incorporation should be effected by the Supreme Court, and should remain under the direct supervision of the Supreme Court, and should not be effected by legislative act, nor submitted to the control or supervision of the legislature. An association organized under the authorization of the Supreme Court could be made readily responsive to changing needs of the profession and the public by the ability of the Court to effect necessary amendment at once through the exercise of its rule-making power."

The Attorney's Hazard When He Contracts With His Client

The plaintiff sought cancellation of a contract with her attorney, now deceased. The contract was prepared by him, was beneficial to him, and was based upon certain representations by him. The plaintiff offered evidence to show the relationship of attorney and client when the contract was made and her execution of it without independent advice, and rested, upon the theory that the burden was then upon the defendant to establish that the contract was fair and free from all elements of overreaching. The defendant rested without proof, and the complaint was dismissed on the ground that the burden of proving the contract unfair and procured by overreaching was upon the plaintiff. The judgment was reversed, and the Court said: "Under the facts in this record the burden was upon the defendant to establish that the contract was made with full knowledge of all the surrounding circumstances, that it was free in every respect from fraud on the part of defendant's testator or misconception on the part of the plaintiff, and that all was fair, open, voluntary and

well understood by the client." *Frost v. Bachman,* 18 N. Y. S. (2d) 702, 703.

Limitation Upon Activities of Young Lawyers Again Urged

Speaking recently to a class of lawyers on the occasion of their admission to practice, Justice William F. Hagarty, of the Appellate Division of the Supreme Court of New York, Second Department, said the policy is wrong that permits a newly admitted lawyer to hang out a shingle and enter upon the practice against the most formidable competition. He predicted that the time will come when limitations will be placed, for a short period of time at least, upon the activities of the newly admitted attorney, adding that in his opinion this would not only be in the interest of a sound public policy but would also be in the interest of the young lawyer himself and the bar as a whole.

"The young lawyer should realize his limitations, in the absence of any distinction by the State between experienced and inexperienced lawyers," Justice Hagarty said. "He should acquire experience by way of association with older men at the bar. When he feels that he is competent to assume the responsibility himself of taking up trial work, it should be in the lower courts in the trial of minor cases.

"The young surgeon does not immediately perform major operations, nor does the young engineer begin by undertaking the construction of bridges and tunnels. They begin by assisting those who have the benefit of the years in their professions behind them. So it should be with the young lawyer."

Compare 26 A. B. A. Jour. 57 (January, 1940).

Fee Stipulations in Divorce Case Void

A wife, defendant in a divorce proceeding, employed an attorney, agreeing that his compensation would be the fee allowed by the court and an additional amount equal to 50% of any money or property recovered for her. It was also mutually agreed that neither, without concurrence of the other, would make any property settlement. On the basis of this agreement, the attorney sought to impose a lien upon alimony paid into Court by the husband. The Supreme Court of Kansas held both the client's promise not to settle without her attorney's consent and the contingent fee provision contrary to public policy and void.

The Court said:

> "The overwhelming weight of authority is to the effect that a contract between a client and attorney in a divorce action providing for a fee contingent upon the amount of alimony awarded is void as against public policy. . . .
>
> "In *Comer v. McGuire,* 121 Kan. 820, 250, p. 345, this court had before it a contract set out in full in that opinion. That contract has substantially the same provisions as are contained in the contract now before us. In discussing that contract, this court said: 'The contract was void as against public policy. *Kansas City Elevated Railway Co. v. Service,* 77 Kan. 316, 94 P. 262, 14 L.R.A., N. S., 1105. Plaintiff contends the provision for payment of a fee in the event defendant did settle, compromise, or dismiss her divorce action, left her free to take such a course, and purged the contract. Defendant contracted, however, not to settle, compromise, or otherwise dispose of the divorce action without her attorney's consent. She could conclude no arrangement with her husband, however desirable, independently of her attorney, without breach of contract, and the provision referred to was in effect a stipulation relating to compensation in case of breach of contract. Reconciliation of the parties to the divorce action, and amicable adjustment of their affairs not extending to full reconciliation, were thus definitely restrained. The contract in the case of *Railway Co. v. Service,* supra, related to an action for damages for personal injury. The contract was held to be obnoxious to public policy, whether viewed in the light of reason or authority. If there may be degrees of odiousness, a contract interposing a barrier to full control by the plaintiff over a divorce action is more deserving of censure, because of the nature of the litigation.' . . .
>
> "And it has also been held in this state that in an action other than for divorce, a contract between attorney and client that the client shall not settle the cause of action without the consent of the attorney, is contrary to public policy and void."
>
> *Dannenberg v. Dannenberg,* 100 Pac. (2d) 667, 669.

Los Angeles Bar Asked to Withhold Donations to Judicial Campaign Funds

The Los Angeles Bar Association has requested the bar of that county to make no contributions to judicial campaign funds prior to completion of its plebiscite on candidates for judicial office.

The following resolution was adopted by the association's board of trustees:

> "Whereas, prior to each primary election of judges for superior court and municipal court, members of this association are directly or indirectly solicited for contributions to the campaign funds of candidates for election or reelection to judicial offices; and
>
> "Whereas, the giving of contributions constitutes in effect an endorsement of the person for whom such funds are solicited, but the refusal of such contributions is frequently embarrassing when other members of the association are making similar conributions; and
>
> "Whereas, it is the desire of the association that each plebiscite conducted by it among the members of the bench and bar of Los Angeles County shall reflect the unbiased and uninfluenced opinion of the members of the bench and bar in Los Angeles County as to the judicial qualifications of the various candidates considered in such plebiscite, and for that reason this association has heretofore requested its members not to endorse candidates for judicial office prior to such plebiscite;
>
> *"Now, therefore, be it resolved,* That members of this association be, and they are hereby requested to refrain from making contributions to the campaign fund of any candidate for judicial office at primary elections, together with all other endorsements, until after the results of the plebiscite of the Los Angeles Bar Association as to such office have been published."

Ambulance Chaser Held Guilty of Illegal Practice of Law

A layman engaged in "ambulance chasing," who consulted with persons injured in automobile accidents, apprised them of their rights and the liability of others, advised them in procuring the services of certain counsel, arranged for making contract for retainer, fixing the amount thereof and advised as to the cost of instituting action and the probable amount of recovery, was recently held guilty of illegal practice of law, adjudged in contempt of court, as having attempted to hinder the due administration of justice, and sentenced to thirty days in jail. *State ex rel. Wright, Atty. Gen. v. Hinckle et al.,* 291 N. W. 68.

H. W. ARANT, Chairman,
Committee on Professional Ethics
and Grievances.

ICELAND AND THE AMERICAS

Present Status of the Northern Island in International Law—Discussion by Two Distinguished American Legal Scholars Born in Iceland

I

By Hon. Gudmundur Grimson

Judge, District Court, Second Judicial District, North Dakota

Iceland Has Unique Position

ICELAND—that little country located under the Arctic Circle and on the dividing line between the Eastern and Western hemispheres—an island of volcanoes and glaciers whose climate is tempered by the Gulf Stream—was settled in the ninth century by liberty-loving Norsemen who abandoned Norway rather than pay tribute to any dictator or absolute monarch. They found the island uninhabited except for a few Irish Monks. A few Irish joined them in the settlement. They established a democracy somewhat akin to a republic. In 930 a parliament called the "Althing" met on the plains of Thingvellir, a natural amphitheater in the mountains. A code of laws was enacted. Parliament was given legislative power, with a judicial section including provisions for jury trials. This republic lasted 333 years. At the celebration of the one thousandth anniversary of the founding of the Althing, in 1930, the representative of Great Britain admitted that if England was the "Mother of Parliaments" Iceland was the Grandmother of Parliaments.

Great progress literary and international was made under the republic. In 986 Greenland was colonized from Iceland. In 1000 Leif Ericsson, a son of Iceland, discovered the mainland of America. In 1000 Christianity was adopted by the act of the Althing. In the twelfth century Snorri Sturluson wrote his great historical and poetical works—the Eddas.

Early Relations with Norway

Because of the fear of what is now called a dictatorship these liberty-loving Norsemen established no central executive when they founded the republic; each local chieftain retained that essential power in his own hands. This led to jealousies, disputes and troubles between a few dominating and selfish chieftains. The King of Norway became arbitrator in some disputes. Finally in 1263 the Althing made him King of Iceland by a direct treaty with him whereby the Icelandic people became his subjects on certain conditions, amongst which were that he should preserve peace for Iceland, that the Icelandic jurisprudence would continue supreme and that all civil administration should be by Icelanders. Thus provision was made in this treaty that in no way should Iceland become a part of Norway though having the same king.

Dependence on Denmark Until 1918

In 1380 the thrones of Norway, Sweden and Denmark were by agreement united in the Danish King. When Norway and Sweden withdrew from that arrangement Iceland remained with the Danish throne.

While Iceland always claimed its independence and at various times entered into direct treaties with other nations, as, for instance, with Great Britain during the first World War, the Norwegian and Danish Kings usurped power and imposed their absolutism on the country. This even went to the extent of the use of force in 1662. A Danish trade monopoly was very oppressive. A dependence on Denmark developed. In the nineteenth century the struggle by the Icelanders for the acknowledgment of Icelandic sovereignty became more active. A treaty with Denmark to that effect was finally negotiated and became effective Dec. 1, 1918. This treaty provided a complete constitutional equality for the two nations under the same King—neither of them subordinate to the other in any respect, two states of equal status in international law—each with full sovereignty over its own affairs independently of the other. This was a new departure in the realm of international law. It differed from many earlier personal or real unions between states.

Until Iceland otherwise arranged, Denmark by this treaty agreed to handle foreign affairs on behalf of Iceland. All determination, in such matters, however, was by Iceland. The Danish foreign service was only an agency through which such determinations were carried out. Iceland immediately declared its neutrality in all international disputes. Iceland never joined the League of Nations. Preparations were gradually made for the handling of foreign affairs directly. Special representatives and trade commissioners were sent to negotiate commercial treaties with various countries.

Early in 1939, when Germany tried to claim preferential rights to air bases in Iceland, the Icelandic government unhestitatingly refused to grant such claims, even though the Emden had been sent to Iceland on a "courtesy" call.

United States Government Recognizes Independent Status of Iceland

Finally when Germany seized Denmark on April 9, 1940, the Althing immediately took up the matter and on April 10 adopted unanimously a resolution assuming direct charge of all its foreign affairs. A ministry of foreign affairs was established in the cabinet. Direct diplomatic relations have immediately been instituted with many countries, including the United States. Our State Department has recognized the new status and sent a diplomatic representative to Iceland.

Nominally the executive power remained in the King after the treaty. Actually this was a mere formality. He appointed as premier and cabinet ministers the men proposed by the majority party or majority coalition of the elected members of the Althing, who then carried on the executive power as long as the Althing voted confidence in them. A separate Icelandic judiciary was established, the Judges being appointed for life or during good behavior, by the minister of justice.

A provision was made for the denunciation of this treaty by either State at the end of the year 1940, and steps had been taken by all Icelandic political parties to carry that out. When, however, Germany, on April 9th, seized Denmark and virtually interned the King

of Iceland and Denmark an emergency arose. He was no longer in position to exercise his royal prerogatives. The original treaty with the King in 1262 provided as one of the conditions that he should maintain the peace of Iceland. This he was no longer in position to do. Moreover, retaining him as King might give Germany a technical claim to executive power over Iceland—something no Icelander wants. For these and other reasons the Althing on the very next day, April 10, passed a resolution lodging the executive power for the time being in the premier of Iceland and his cabinet. This politely severed all relations with the King. While the resolution is for the time being only, it is most likely that the King will never be restored.

Foreign Affairs

Thus the two institutions which have beclouded the independence of Iceland heretofore—the handling of foreign affairs through the Danish diplomatic service, and the Danish King—have been removed. Iceland now conducts its own foreign affairs directly. Iceland has now its own executive and no matter what name will in the future be given to that executive he will undoubtedly be an Icelander and the government will remain democratic if the Icelanders are allowed to continue to control their own destinies.

So we now have this little country, about 40,000 square miles in area, of which only one-fifth is inhabitable, with a population of only 120,000, facing the world and the future with its original democracy fully restored. Its culture and ideals are in accord with American civilization. It has no army, navy nor air force and must rely entirely on the good will of nations. It has but one valuable asset that may make dictators covet its possession. It is potentially a most excellent air and submarine base. It is only about 700 miles from Trondheim, Norway, a present German air base. Then from Iceland to the nearest point in Canada is only about 1200 miles. It is nearer New York than is Ireland. The Pan-American Airways long had rights to an air base in Iceland and Col. and Mrs. Charles A. Lindbergh in 1933 explored and showed the feasibilty of a northern air route with a base there. Iceland is and always has been the most excellent stepping stone between the old world and the new. For instance its midway location would make it an excellent base for Germany in an attack on Canada. That very fact, however, should assure its protection by the British navy. It also shows good reasons for the United States to include it within the Monroe doctrine. It is geographically an American island and largely within the western hemisphere. It is so close to the northern part of the continent as to be a serious threat as an air aid submarine base of a hostile power. President Monroe declared that an attempt by the European powers "to extend their systems to *any portions of this hemisphere*" would be considered "as dangerous to our peace and safety" and that such an act would be taken "as the manifestation of an unfriendly disposition towards the United States." That seems to apply strongly to the seizure of Iceland by any European power, for if done the most apparent reason would be to have it to use as a base in case of hostility towards the United States.

Iceland has had its part in the development of international law. It now enjoys a unique status in international law. It is important in international relations as well.

II

BY SVEINBJORN JOHNSON
Professor of Law, University of Illinois, and Counsel for the University

Effect of Recent German Invasion

THE effect, if any, of the German violation of Denmark upon the position of Iceland in international law cannot be understood without a glance at history and an examination of certain constitutional documents and public acts. The brutal pragmatism of force on one side, the size of a country, in territory or population, bears no legal relation to its status as a sovereign; and recognition—not heretofore asked by or accorded to Iceland—does not create sovereignty, but merely serves to introduce the state into the family of nations.[1] On this there is no dispute. Settled largely from Norway, with a small sprinkling from the British Isles, Iceland in 930 A. D. established a free government under a constitution of its own creation, which it adopted on the world famous Thing-vellir[2] where

1. 1 Moore, International Law Digest, PP. 72, 74.
2. Plains of the (A) thing, comparable to the Tynewald of the Isle of Man. In 1930 Iceland celebrated the one thousandth anniversary of the Founding of Paarliament, on which occasion the United States sent a Commission to attend as its representative, headed by the late Senator Norbeck of South Dakota.

(*Note by Judge Grimson*)

Since my article was written the announcement has come over the radio that Great Britain has landed an armed force in Iceland, supplied with airplanes and all fighting equipment. At the same time Great Britain announced that the independence and sovereignty of Iceland would be respected and that these armed forces would keep to themselves and without any interference in matters of local government. New trade agreements also were offered.

As was quite natural and logical, there was no opposition by the Icelandic government to this procedure. In fact, it is quite reasonable to presume that this was welcomed if not invited by the government.

As pointed out in my article, Iceland is too valuable and too tempting an air and submarine base to be left lying unprotected. It is about 700 miles from Trondheim, Norway, a present German air base. Then from Iceland to the nearest point in Canada is only about twelve hundred miles.

Iceland and the Monroe Doctrine

Again this emphasizes a good reason for including Iceland within the Monroe Doctrine. Great Britain has now forestalled the extension of the Nazi system to Iceland, which would have been a thrust of that system into the Western Hemisphere, as Iceland is largely in the Western Hemisphere, and certainly could be considered "dangerous to our peace and safety." The world should know that we consider the extension of the ideologies of the European powers into Iceland as the "manifestation of an unfriendly disposition towards the United States." All the bases of the Monroe Doctrine are here involved.

Iceland can no longer depend on its isolation for protection. It must now have the good will of nations and especially of Great Britain and the United States. Iceland's location, history and civilization should be a strong appeal to those great nations for that good-will towards Iceland.

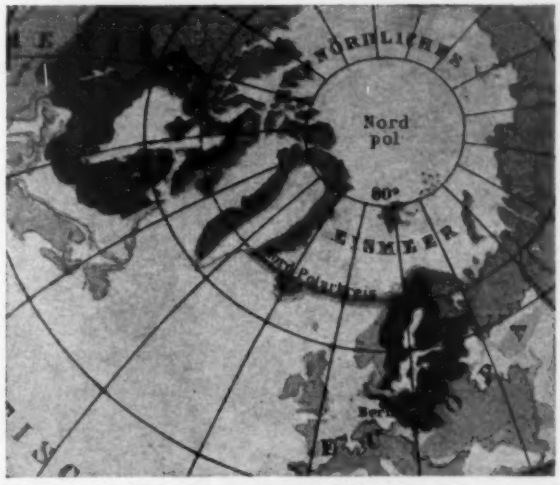
the Parliament convened in the open for nearly one thousand years. Later[3] Iceland agreed to accept as its king the King of Norway; and still later, Iceland and Norway acknowledged the Danish King as ruler. Then followed a period during which Denmark exercised a certain but steadily diminishing sovereignty in Iceland, ending on December 1, 1918, when the Act of Union between these countries went into effect. Iceland then became a sovereign state.[4]

Iceland a Sovereign State, Independent of Denmark, But with Same King

In this document—unique in international law—Denmark expressly admits that the status of Iceland is that of a "free and sovereign state," on complete parity with the former.[5] This Act was solemnly enacted by the legislatures of both countries and approved by the King, and is, therefore, a treaty-statute.[6] It is agreed that the countries shall be "united by a Common King and by the agreement contained in this Union Act,"[7] but the sovereignty of each is complete and distinct.[8]

Germany Violates Treaty Obligation

On April 9, 1940, the civilized world was stunned by the German seizure of Denmark and its complete occupation by a powerful military force, in defiance of a non-aggression pact entered into by Denmark a few months before on the urgent invitation of Chancellor Hitler. This pact had provided, as a further opiate to the vigilance of an honorable and peace-loving people, that in the event Germany became involved in war, Denmark would be privileged to trade with the combatants on a peace-time basis. Taking note of this (at least temporary) end of Danish sovereignty and its subjection to another power,[9] the Althing passed two resolutions on April 10, 1940, conferring on the Icelandic Ministry the powers of the King with respect to Iceland under the Act of Union, and assuming full control of its foreign affairs, both "for the time being."[10]



ICELAND IN ITS RELATION TO EUROPE AND AMERICA
(from a 1925 map)

King No Longer Able to Act

A legislative bill must be signed by the King as the depository of the executive power before it becomes a law. The King, not being responsible in the type of

3. About 1262-64.

4. In the discussion of the Draft Convention on the Law of Treaties, it is said that the term "State" "would doubtless apply to * * * Iceland * * *" See Research in International Law, Harvard Law School, Part II. Law of Treaties, p. 703 (1935).

5. Art. I, Sec. 1 and Art. VII. In the latter article Denmark agrees to notify foreign powers that "she has recognized Iceland as a sovereign state, and . . . that Iceland has declared herself perpetually neutral and has no naval flag."

6. The term "treaty-statute" is advisedly used. Neither rule nor usage in international law defines the essential constituents of a "treaty," or distinguishes it clearly from other types of inter-State agreements. If a "treaty" be, as is sometimes said, the most dignified form of international agreement, bearing in mind the purpose and the method of ratification, the Icelandic-Danish Act of Union may be looked upon in that light. On the other hand, the act was *enacted* by each State with substantially all the solemnity of statutory law.

7. The salient points of this Act, in addition to those stated in the text, are: succession to the throne cannot be changed save by consent of Iceland (now fixed in Articles I and II of the Danish Succession Act of 1853); a reciprocal pledge of equality respecting trade and the treatment of nationals; equal fishing rights conceded Danish vessels in Icelandic territorial waters; agreement by Denmark to look after Iceland's foreign affairs, but with the right reserved to Iceland to negotiate treaties directly with and send its own representatives to foreign powers in "concert with the Minister of Foreign Affairs"; fishery inspection, primarily the duty of Denmark, may be assumed by Iceland at will; a judiciary wholly Icelandic; each country makes its own laws; and the agreement may be unilaterally cancelled after the expiration of the year 1943 by action of the (Danish) Rigsdag and the (Icelandic) Althing, subject to the approving vote of three-fourths of those voting thereon when three-fourths of the qualified electors have gone to the polls. Differences concerning interpretation are referable to arbitration.

8. Suggestive of the sovereign status on December 1, 1918 is the fact that although Denmark joined the League of Nations, Iceland did not; and that notwithstanding Denmark joined in the League's Sanctions against Italy, Iceland concluded a trade treaty with Italy in 1936, during the period of the Sanctions, of a kind Denmark as a member could not legally have made. What the effect upon ordinary treaties may be when one party ceases to be a State by reason of annexation by or fusion with another State is beyond the scope of this article. That raises a question of State succession concerning which "there is no agreement among writers . . ., no uniform jurisprudence and no settled practice." Research in International Law, supra, p. 1076. Applicable laws of Iceland and Denmark, a part of the background of the Act of Union, specify how the contingency which has arisen shall be dealt with, as indicated later in the text of this article.

9. There is no disputing the proposition that a treaty or agreement imposes no obligations upon a State not a party to it. Had Germany entered Denmark under an agreement between these countries, whereby the sovereignty of Denmark was impaired, was virtually absorbed by or assimilated with that of Germany, the effect of such an understanding on Iceland would have been *nil*. The fact that Denmark *tacitly*, even if it be under impelling necessity, concurs in or assents to this encroachment on her sovereign status, cannot alter the consequences which flow from the fact—cannot bind Iceland in any degree against its will. The Netherlands Government, to cite one of many precedents, refused to recognize the Treaty of Versailles as binding on it in any sense, and denied the application of the associated powers for the surrender of the Kaiser for trial pursuant to Article 228 thereof.

10. In view of the importance of this action, as well as the high plane of courtesy on which it is pitched, these resolutions are set forth verbatim herewith:

"First: Having regard to the fact that the situation created makes it impossible for His Majesty the King of Iceland to execute the royal power given to him under the Constitutional Act, the Icelandic Parliament declares that the Ministry of Iceland is for the time being entrusted with the conduct of the said power.

"Second: Having regard to the situation now created, Denmark is not in a position to execute the authority to take charge of the foreign affairs of Iceland granted to it by the provisions of article 7 of the Danish Icelandic Union Act nor can it carry out the fishery inspection within Icelandic territorial waters in accordance with article 8 of the same Act, therefore the Icelandic Parliament declares that Iceland will for the time being take the entire charge of the said affairs."

Harbor at Reykjavik

constitutional monarchy under discussion, governmental responsibility is necessarily centered in the Ministry. All connection between Iceland and Denmark was cut off by the German invasion, and bills cannot be sent for the King's signature. He is no longer, politically and practically speaking, a free agent. In Article IV of the Constitution of Iceland it is provided that should the King be unable to discharge his constitutional functions, that situation shall be dealt with in accordance with the Danish prescription in such circumstances. The Danish Act of February 25, 1871, Section 4, provides that if the successor to the throne is absent from the country when the King dies, the national legislature (Rigsdag) shall name a date prior to or a period within which he must return to assume the royal power, and in the meantime this body has the powers of government or may designate who shall act. This act further states that if the King be unable to take needed steps for a temporary transfer of power when he cannot act himself, the Parliament shall be convened and shall act as may to it seem necessary in the circumstances. This body may, of course, direct the Cabinet to exercise executive and other necessary powers.

It will thus be seen that the Althing, in adopting the resolutions referred to, acted in exact conformity with applicable statutory and constitutional law. In the emergency created by the seizure of Denmark and the consequent impairment of its sovereignty and paralysis of its political powers, prompt action for the protection of the interests of Iceland became a paramount necessity. This could be accomplished only by taking the steps legally permissible when, through any cause, temporary or permanent, the King was no longer able to act.[11]

11. By publishing pictures of the King taking his customary horseback rides (the writer has been told on good authority that at least some of the pictures probably antedate the occupation) the Germans want us to believe that life goes on as before in Denmark. The world is reminded, however, that Haakon of Norway, who at this writing has not acquiesced in the German seizure of his country, is hunted by German soldiers who, reputedly, have been directed to take him dead or alive. The cold and cruel fact is that the government, the police of Copenhagen, and the economy of Denmark are completely dominated by the agents of Adolf Hitler.

Independence of the Island

With respect to foreign relations the situation is the same as in the case of the Kingship. Denmark was no longer a free agent as to its own foreign affairs and, obviously, was similarly situated as to those of Iceland. The latter country was, therefore, obliged either to assume full control directly, or request another country to act in its behalf, a recourse common among sovereign states in sundry emergencies. Iceland chose the former course.

Another fact is important in examining the validity of the grounds on which the Althing acted. Article V, Section 17 of the Act of Union provides that in case of differences concerning interpretation of the Act, the Swedish and Norwegian governments shall, in specified contingencies, nominate an umpire. Germany had seized Norway, its government was being pursued by relentless foes, and its King a fugitive in hiding. When Althing took the action described, this clause had become inoperative through change of conditions which made performance impossible in the manner contemplated by the parties when the treaty-statute went into effect.

If the maxim or doctrine, *"Rebus sic stantibus,"*[12] has any worthwhile or recognized place in customary inter-

12. "A treaty of perpetual or indefinite duration which contains no provision for revision or denunciation lapses, in the sense that stipulations which remain to be performed cease to bind the parties to the treaty, when it is recognized by the parties to the treaty or by competent international authority that there has been an essential change in those circumstances which existed at the time of the conclusion of the treaty, and whose continuance without essential change formed a condition of the obligatory force of the treaty according to the intention of the parties." Chesney Hill in The University of Missouri Studies, Vol. IX, No. 3, p. 83 (1934).

national law, it would seem applicable in the situation created by the German occupation of Denmark. On the principle of impossibility of performance or frustration of contracts, Iceland is abundantly justified in her course. While the text of the Act of Union seems wholly unequivocal, it must be noted that in the interpretation of the language used, other matters must be considered, such as the general purpose, the historical background, the circumstances when the Act was approved, and existing today when the interpretation is being made. This, it is believed, is in substance the rule of interpretation adopted by the Permanent Court.[13]

A Member of the Family of Nations

The language of the treaty-statute, the stream of history, current circumstances and purposes expressly stated, unite in impelling the conclusion that two states accepted a common king on a parity of legal status and sovereignty. Indubitably, at least "for the time being," as the Icelanders politely put it, the island is entitled, even though it has not asked it, to full recognition as a member of the family of nations, without the most shadowy claim of any right to or interest in Iceland on the part of Germany by virtue of its rape of Denmark.[14]

13. See Research in International Law, supra, pp. 937 and 948.

14. The author is not unaware that at the moment it may seem rather academic to speak of or rely on "rights" resting in law or in treaties. Nevertheless, it seems clear that if we are to strike that word from the vocabulary of civilized man, or erase its concept from the consciences of human beings who claim progress beyond the murk of the jungle, the only basis on which small nations, without military might, can exist has disappeared from the face of the earth.

Moffett Studio

PROF. SVEINBJORN JOHNSON

Washington Letter

(*Continued from page 467*)

future, of the Code of Federal Regulations, as provided for by Section 11 of the Federal Register Act, as amended (50 Stat. 304). This is the complete codification of all documents which each agency of the Government is required to furnish every fifth year beginning July 1, 1938. The term "document" as here used means any Presidential proclamation or Executive order and any order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by a Federal agency.

There will be arranged in the code all documents of the several administrative agencies of general applicability which were in legal effect June 1, 1938. Annual supplements to the code will replace the bound volumes of the Federal Register heretofore issued and will contain the regulatory material which has appeared in the daily issues of the Register. The daily issues of the Federal Register will serve as further supplements to the code, the documents appearing therein following, hereafter, the code arrangement.

Volumes two to six of the code sold for $2.25 each at the Government Printing Office. Information as to the availability and cost of the code may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C. The volumes average around 1,000 or 1,200 pages. There are seventeen books in the series but the volume numbers run only to fifteen, there being two books required for each of the titles: 26-Internal Revenue; and 50-Wildlife. Volume 15 is the General Index. There are, in all, fifty titles.

Logan-Walter Bill

This important piece of legislation now stands before the Senate in that glorified condition known as the columnist stage. That is to say, most of the columns written from and at Washington have taken strong stands either for or against the bill. This should be all to the good in the long run by serving to inform the country—or to induce the country to inform itself—upon the purposes and merits of the legislation.

Whether the proportion of votes in the Senate will be anything like that in the House, where it was passed by a vote of 282 for, to 97 against, is impossible to foretell at this time. If the bill should pass and then be vetoed by the President, it is assumed a strenuous effort will be made to pass it over the veto, should that seem possible.

One element which seems to provide considerable worry to some persons who have talked about this bill in print is whether it would upset the provisions found in much recent legislation to the effect that, unless they are not supported by substantial evidence, findings of fact by administrative agencies will be binding on the courts. Every one knows how possible it is, in a case of doubtful color, to find that the evidence which it had been alleged supported the finding was not really substantial evidence. But, even so, it might be interesting if somebody would more thoroughly develop the idea that the courts, as one of the three coordinate branches of our government, need not pay any more attention than they desire to such legislative efforts to dictate to them how they shall do their work.

JUNIOR BAR NOTES

BY JOSEPH HARRISON
Secretary of the Junior Bar Conference

WHERE in times past the American Bar Association was brought home to a state by a yearly visit and address of the President of the Association at the annual meeting of the state bar association, today in addition to this important form of contact the Junior Bar Conference through its state officers and activities carries the Association's torch throughout the year not only in every state but in many counties, cities and townships. Each month brings reports of younger members of the Association making progress locally in some branch of the Junior Bar Conference's program.

Platteville, Wisconsin

Thus, W. Roy Kopp, Platteville, Wisconsin, local director of the Conference's Public Information Program, has submitted a report showing how this Program has been used to further the American Citizenship Program of the Wisconsin legislature and to coordinate this work with county citizenship committees. Mr. Kopp is also a member of the Grant County Citizenship Committee. Recently he distributed throughout the state copies of an article prepared by H. B. Morrow, Director of the Wisconsin Institute of Technology, entitled "The Mission of Americans." An interesting point about this article is that although it was written in 1923 its message has particular force in this year of grace 1940. Mr. Kopp writes that his activity is part of the program of Phillip Owens, State Director of the Public Information Program, who has emphasized the importance of cooperating with the county superintendents of schools in the several counties of Wisconsin in connection with the American Citizenship Program required by the state legislature.

Kesler and Schweitzer in Arizona

From the great Southwest comes more news indicating that the Conference program is making headway under the state chairmanship of Phil J. Munch of Phoenix. On May 2 an enthusiastic meeting of thirty-five younger lawyers (a relatively large number for Arizona) greeted Harold W. Schweitzer, of Los Angeles, council member for the ninth circuit. Joseph T. Melczer, Jr., of Phoenix, assisted in the arrangements. The local press was generous in the space given to the address of Mr. Schweitzer, who showed how the work of the Junior Bar Conference was serving the younger lawyers, the legal profession and the public, and was striving for clearer mutual understanding among them. An article by Mr. Munch in the *Arizona Weekly Gazette* gave a complete and detailed exposition of the aims and activities of the Conference. Eloquent testimony to the success of the efforts of the Arizona officers of the Conference is the fact that the new membership quota for the state for this year had already been exceeded by April 1.

The Phoenix meeting was held the day before the annual meeting of the Arizona State Bar Association at the Grand Canyon, where President Charles A. Beardsley was the principal speaker. Here, a place was given on the program to the representatives of the Conference. A. Pratt Kesler, of Salt Lake City, national Vice-Chairman, and Mr. Schweitzer explained the Conference programs and the opportunities for cooperation with state bar organizations.

New York Regional Meeting

A well attended regional meeting of Junior Bar executives in the Eastern and Northeastern states was held at New York on April 6. Thirty-two officers of Junior Bar groups from New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland and the District of Columbia attended. Because of the great interest shown, the meeting, originally scheduled for a morning session only, was continued after luncheon.

Louisiana

From New Orleans, State Chairman Leon Sarpy, who is a member of the faculty of Loyola University School of Law, reports an interesting item. Each year the senior class is taken on a tour of the civil courts building in connection with the course on pleading and practice. In connection with a discussion of the law students' activities, Mr. Sarpy, who is professor of pleading and practice, explains that throughout the year the students are given problems requiring the drafting of various forms of pleading, based on hypothetical facts, involving petitions, answers, motions, rules and other documents. Towards the end of the year, when most of the work has been completed in the classroom, the class is taken through the civil courts building where the chief clerk in the offices of the Clerk of the Civil District Court, Civil Sheriff, Registrar of Conveyances and Recorder of Mortgages explains what is done with papers after they are filed, and in general how the offices are run. The tour is climaxed by a visit with Chief Justice Charles A. O'Niell of the Louisiana Supreme Court in his chambers. The Chief Justice receives the students and addresses them briefly. This activity fits in with the work of the Conference's Committee on Relations with Law Students.

Membership

The latest report of Willett N. Gorham, Chairman of the Membership Committee of the Conference, indicates that while a number of states have passed their quota of new members for this year, there are still a great number who are far behind. Mr. Gorham urges all membership workers "to put on a strenuous campaign for the next few months." He also calls attention to the fact that by special arrangement, applicants joining the Association during the remainder of the current fiscal year, who accompany their applications with a full year's dues, will receive the perquisites of membership during the remainder of this year, and will be credited with the payment of their dues for the fiscal year ending June 30, 1941.

London Letter

The Temple Church

MAY 24th, 1940, marks the seven-hundredth anniversary of the consecration of the beautiful Choir, or oblong, of the Temple Church, which took place on Ascension Day in the year 1240, in the presence of King Henry III and many of the nobles of England. A special service in commemoration of the occasion is to be held on May 5th. All who have seen this most beautiful and finished example of early English Church architecture will realize that only a master-mind could have designed it. It is eighty-eight feet in length, fifty-nine and a half in breadth and thirty-seven in height, and is in perfect keeping with the older, or round, part of the Church, which was consecrated by "the Lord Heraclius by the grace of God Patriarch of the Church of the Holy Resurrection" (according to an ancient inscription) on the 10th February, 1185. The roof of the choir, on which is to be seen the heraldic devices of the Middle and Inner Temples, with other ornamentation, is supported by four graceful Purbeck marble columns on each side, culminating in richly moulded capitals, from which springs the vaulting of the centre and two side aisles.

Separation of the Sexes

Mention of the heraldic emblems calls to mind the fact that the Temple Church is maintained by the two Societies of the Inner and Middle Temples, each Inn contributing an equal share of the cost, and the northern half of the choir is appropriated to the use of members of the Middle Temple while the southern half is occupied by Inner Templars. It is interesting to note that in the Round Church only can both sexes sit together during a service. In the choir the sexes are separated and women sit apart from men, even though they may be members of one or other of the Inns. This custom of segregating the sexes certainly dates back to the time of Queen Elizabeth, and possibly earlier. In 1582 it was agreed by both Houses "that a butler of every howse shalbe appoynted to kepe the quyre dore that no woman come into the said quyre, and moreover that they the said butlers do ther endevor to kepe out of the said quyre all other strangers except noblemen and knyghts." By the year 1653 it would seem that the butlers had become somewhat slack, for it was necessary for the Inner Temple to order them not to "suffer any woman to sit or come into any of the benchers' seats in the church, but that those seats be on the next Lord's day, and so continually thenceforth, kept for the use of the benchers of this House only, as in former times they have been." An amusing illustration of the snobbishness of the time is reflected in an order by the Inner Temple, in 1693, instructing two of the butlers that they "do not admit Sir Thomas Robinson's housekeeper, Mrs. Green, the glazier's granddaughter, nor any inferior person into the ladies' seats in the Temple Church for the future, at their perils."

Reader of the Temple Church

Preb. John Francis Clayton, Reader of the Temple Church, has been appointed a Resident Canon of Norwich and has resigned his appointment in the Temple, which he had held since 1931. He was Chaplain to the Forces from 1916 to 1919, and was awarded the Military Cross in 1918. His cheery personality will be greatly missed in the Temple. His place has been filled

(*Continued from previous page*)

New York City Monthly Luncheons Continuing Successfully

In New York City the regular monthly luncheons sponsored by the Junior Bar Conference were held in March and April, at each of which between 80 and 100 young lawyers were present. In March, Friedrich Kempner, a German lawyer who has recently moved to New York City, spoke on the subject, "The Position of the Lawyer in Germany Today." Mr. Kempner told how the work of lawyers in Germany had been affected by the Nazi regime not so much by changes in procedure or in substantive law as by indirect methods.

The group which attended the April luncheon heard Elbridge Stein, the handwriting expert, discuss "The Disputed Document in Court" and saw pictures which indicated how, in actual cases, fraud had been disclosed by an examination of the tiniest marks—in one instance, the tail of a comma.

At the time this material is being prepared the May luncheon is being planned, at which Mrs. Elinore M. Herrick, Regional Director of the National Labor Relations Board in New York City, is to speak.

If as many attend in May as in the past it is likely that this series of luncheons will be continued in the fall and become another permanent activity of the Junior Bar Conference in this area.

At this writing a meeting of the officers and executive council is scheduled for May 19, 1940, at Washington. Plans for the annual meeting at Philadelphia and proposed revisions of the by-laws are the principal subjects to be considered.

Kresge

JOSEPH HARRISON

by the appointment of the Rev. Alfred Humphrey Meadows Kempe, who was called to the Bar at the Inner Temple in 1924, but later went to the Church, becoming deacon in 1931 and priest in the following year. He has been one of the Chaplains of Westminster Abbey since 1937. The new Reader is the second holder of this Office to have been first a barrister before taking Holy Orders. William Henry Rowlatt, who was Reader from 1820 to 1851, was also Called to the Bar at the Inner Temple.

The clergy responsible for conducting the services in the Temple Church are the Master and the Reader, though in Stow's time the clerical staff consisted of "a Master and four stipendiary priests, with a clerk." The Templars were exempted by a Papal Bull from Episcopal jurisdiction and, though there is no longer any suggestion of allegiance to the Pope, this exemption has continued to the present day. The Master still takes his place in the Temple Church, without Institution or Induction, on the strength of his appointment under Letters Patent from the Crown. The Reader of the Temple Church is appointed by the two Societies of the Inner and Middle Temple alternately as a vacancy occurs. This time it was the turn of the Middle Temple to appoint. The Reader's duty is to read the prayers and lessons at each of the Sunday services, and to preach the sermon at the afternoon service, except on occasions, now very rare, when a bencher of one or other of the Inns exercises his privilege of appointing a special preacher. The first Reader of the Temple Church, of whom there is record, was Anthony de Corro, who was appointed in 1571 and held the office for about three years.

Solicitors: Examination of Clerks. War Dispensations

The Solicitors (Emergency Provisions) Bill, recently introduced in the House of Lords by Lord Wright, has for its object the meeting of difficulties arising from the war and affecting solicitors or their articled clerks. Under the Solicitors Act, 1932, no person may be admitted a Solicitor unless he has served under articles for the required term and has passed the Law Society's intermediate and final examinations. The required term is five years, but in certain cases where a clerk has a law degree from a university that period may be reduced to three years, and in other cases where he has taken a law course but not a full degree it can be reduced to four years. An articled clerk may not present himself for the final examination until the examination immediately preceding the expiration of the term of his articles. It is realized that a strict adherence to these conditions in war time may create serious hardship to those who are now undergoing the necessary training to become solicitors, and who may be serving in the forces or otherwise engaged on war work, and the Council of the Law Society are desirous that provision should be made, as in the last war, to enable them at their discretion to exempt any articled clerk from taking the intermediate examination, and to grant permission for him to enter for his final at some earlier date, if circumstances connected with the war render such a course needful.

War Service Counted

The Bill, when passed, will also give the Council power at their discretion to reckon the articled clerk's period of service with the forces as good service under articles, subject to the clerk being required to be actually employed as an articled clerk in the proper business of a solicitor for an aggregate period of not less than two years. The Law Society will also be enabled, in particular cases, to treat attendance at courses of lectures as equivalent to service under articles. From time to time it has been the custom to award prizes, medals or scholarships on the results of examinations; but it is inevitable that many of those now serving under articles will be taken away and others, perhaps, will not enter into their articles. As a result it might well be that to continue to award those scholarships would react unfairly against those who are serving their country, and power is sought to suspend their award during the present emergency and, if thought desirable, to invest the accumulated income from the various funds in order to help those who continue or start as articled clerks after the war. It will be remembered that prizes and scholarships usually awarded by the Inns of Court to Bar students have been suspended for the duration of the war. It is provided in the Bill that certain powers now exercised by the Master of the Rolls may be exercised under his direction by a Judge of the High Court. The Bill also deals with the fee for a practising certificate, which is £1. Under the present law 5s. is retained by the Registrar, the remainder being devoted to legal education. As this remaining 15s. has been found to be more than is needed for the purpose it is proposed to give the Law Society discretion to use it in other ways they may think fit. The Law Society will also be given power to reduce the number of examinations to be held during a year. It is further proposed that the Master of the Rolls should relinquish to the Council of the Law

Pictures of the Temple Church from Robert J. Blackham's *Wig and Gown: The Story of the Temple, Gray's and Lincoln's Inn.* London: Sampson Low, Marston & Co. 1932.

Society his powers relating to the registration of articles; the permitting a clerk to hold some office or employment whilst serving under articles; the granting of special exemptions from preliminary examinations; and other discretions at present held by him.

Law Reporting: Views of Lord Chancellor's Committee

In the "London Letter" of April, 1939, reference was made to the appointment of a Committee, by the then Lord Chancellor, to report and advise in regard to representations which had been made from several quarters to the effect that the great number of law reports which appeared to be increasing was causing difficulty for members of the profession engaged in the actual work of the Courts by reason of their multiplicity, the expense of purchasing them and the difficulties experienced, both by practitioners and Law Libraries, in finding sufficient space for their accommodation. This Committee has now issued its report and, in spite of the fact that no solution of the difficulty has been found by the majority, the report itself is one of the most interesting, to lawyers, of the many Stationery Office publications which have appeared in recent years. Quotations are made from Blackstone and from Lord Mansfield as to the value of precedents in relation to principle, and it is agreed that the binding force of precedent is now firmly established. This being so the importance of accurate reports of judicial decisions is at once obvious and the Committee's view of the essentials of a good report is worth quoting. They say "the purpose of a law report is the exposition of the law. The report of a case should therefore contain all that is material to this end and nothing else. It should show the parties the nature of the pleadings, the essential facts, the arguments of Counsel, the decision, and the grounds of the judgment." It is pointed out that the skill and judgment of the reporter will be shown in particular by the manner in which he states those facts and those facts only which are necessary to the decision of the question of law involved, and adequately summarises the arguments. The value of a report, it is noted, is enhanced by a good headnote, and seriously diminished by a bad one.

What Decisions Should Be Reported

As to what decisions should be reported the Committee agree with the view expressed by Lord Lindley in the "Law Quarterly Review" (vol. 1, p. 143), where he wrote "the subjects reported should include all cases which introduce or appear to introduce a new principle or new rule; or which settle or tend to settle a question on which the law is doubtful; or which for any other reason are peculiarly instructive." They also agree that, although collections of rubbish must be carefully avoided, in cases of doubt it will be safer to report a case, however shortly, than wholly to omit it. While it is emphasized that it is desirable that publication should take place as soon as possible after judgment it is realised that accuracy is the first essential.

History of Law Reporting

In the course of their Report the Committee give a brief survey of the history of law reporting from the earliest times to the present day, introduced as a prelude to the consideration of current conditions, and this survey is without doubt one of the most interesting and useful parts of the Report. In it is described the state of affairs which led to the formation of "The Incorporated Council of Law Reporting for England and Wales" and the publication of "The Law Reports" in 1865, after which the various old series of authorised Reports ceased publication. But the hopes of the creators of the "Law Reports" were disappointed. The "Law Times," the "Law Journal," the "Weekly Reporter" and the "Solicitors' Journal" continued, and to these were added the "Times Law Reports" in 1884 and the "All England Reports" in 1936. With regard to special Reports such as "Tax Cases," "Patent Cases" and "Knight's Local Government Reports" it is recognised that they are of great value to many besides lawyers and there is no ground for interfering with these publications.

It is impossible in a short note such as this to give particulars of all the items considered by the Committee, such as the reportability of cases, accuracy, completeness, correction by the Judges, cost and accommodation of the numerous volumes, and other matters. Suffice it to say that no solution of the difficulty was found, and a candid confession of failure is made by the statement that no cure could be recommended for the inconveniences now experienced which would not bring greater evils in its train. It is, however, suggested that the general rule of exclusive citation of the "Law Reports" should be enforced, although this does not mean that if a case is not reported in the "Law Reports" it is not to be cited from other reports. There is also a suggestion that the "Law Reports" should be "speeded up."

Professor Goodhart Dissents

Professor Goodhart, one of the Committee, submitted a dissentient report, and it is regretted that considerations of space in this Letter will not permit the full treatment which it deserves. While he agrees with one or two of the Committee's observations he does not hesitate to state that "the fallacy of the Report seems to lie in the emphasis which the Committee places on the semi-official Law Reports. It refers to those as the 'permanent' reports, and suggests that the others, such as the Times Law Reports and the All England Reports, are 'temporary.' If it were true that all cases of importance are sooner or later—sometimes very much later—published in the 'Law Reports' then this emphasis would be understandable, but it is not a true picture of the present situation. The 'Law Reports' cover less than 250 cases a year, of which only about one-third are concerned with questions of what may be termed common law. On its face it is difficult to believe that any system of law can be either so complete or so flexible that in a whole year less than a hundred problems of general interest should fall to be considered by a body of over 40 Judges. How false this picture is, is shown by the fact that the other unofficial reports, taken together, cover over 1,000 cases per year in addition to those published in the 'Law Reports.' Concerning this great body of cases the Committee is silent except to express the mild hope that the reporters should, if possible, be in Court during at least some part of each case."

The above quoted paragraph—only one of many—gives an idea of how widely Professor Goodhart's views differ from the conclusions arrived at by the other members of the Committee. And wherever he expresses such a divergence of opinion he supports his own contention with a vigour which is most refreshing. He recommends that official shorthand writers should be attached to all Courts of record to take and transcribe all judgments, that the transcripts should be sent to the judges for such revision as they might consider desirable, and that after a reasonably short period, not exceeding if possible a week, the transcripts should be returned to a central office at the Law Courts, where copies could be obtained by reporters and other persons on payment of a fee. He realises that under present war conditions there might be some difficulty in introducing this system in all courts, and suggests that in the first instance it should be applied to Appellate Courts. He believes that it would be found so convenient that it would later be introduced in all Courts of record.

The Temple S.

Civilization and Law

Hon. Cordell Hull, Secretary of State, speaking at Washington on May 13 as president of the American Society of International Law, said:

"Institutions have been built up to give effect and reality to order under law within and among nations. They have been largely responsible for the flowering of our modern civilization in the spheres of political security, social justice, scientific progress, and economic betterment.

"This progress has not been achieved without stupendous effort. There have been interruptions and setbacks. Frequently, forces have arisen which have challenged the very concept of order under law, especially in the sphere of international relations, and have plunged nations into war, the greatest of all deterrents to human progress.

JACOB M. LASHLY
of the St. Louis, Missouri, Bar

"That these challenges and the conditions of international lawlessness which they created have not been permanent setbacks is proof of the inherent vitality and virility of the great principles underlying the whole concept of world order under international law. These facts attest the indomitable strength of the spirit which has been the great driving force behind the determination of the human race to rise from the darkness of lawlessness to the light of law.

"Today, mankind is the unhappy victim of another challenge of this sort—a powerful challenge which threatens to wipe out the achievements of centuries in the development of international law and to destroy the very foundations of orderly international relationships. In the face of this challenge, it is of the utmost importance that every citizen visualize clearly the cardinal features of international law and of order based on law, as well as the conditions which would prevail if they were destroyed.

"Order under law in the relations between and among nations requires scrupulous respect for the pledged word. It requires fulfillment of obligations. Without these, the whole fabric of mutual trust and, in fact, of civilized existence must crash to the ground. Without confidence that a promise made by a nation will be kept and that an obligation assumed by a nation will be honored, international relationships become reduced to the level of the jungle."

REVIEW OF RECENT SUPREME COURT DECISIONS

Sherman Anti-Trust Act: Oil Companies' Case: Conspiracy to Raise Prices is Illegal *Per Se*, and there is no No Place for Theory of "Reasonable Restraint of Trade"—State Cannot Make Peaceful Picketing Illegal—"Locality" in Determining Prevailing Minimum Wages in Public Contracts: Sellers to Government Have No Standing to Enjoin Secretary of Labor—State Foreclosure and Section 75 of Bankruptcy Act—Alimony Trust: Status of Income Under Federal Income Tax Law—Railroad Reorganization: Liens on Sublessee's Estate for Operating Deficits—Resident Agents of Outside Insurance Companies May be Regulated by State—Controversies Between Western States on Diversion of Water—State May Exempt Farmers from Criminal Statute Against Combinations in Restraint of Trade—Building and Loan Associations: Restrictions on Right of Withdrawal Held Constitutional—San Francisco May Not Sublet Hetch-Hetchy Water Power—State Statute Forbidding "Two Story Trucks" Carrying Autos is Valid—National Banks May Not Secure Deposits by Pledge of Assets—Other Decisions

By Edgar Bronson Tolman*

Statutes, Sherman Anti-Trust Act—Conspiracy to Raise Prices

A conspiracy to raise prices is illegal per se and as to prices the theory of "reasonable restraint of trade" is inapplicable.

United States of America v. Socony-Vacuum Oil Company, 84 Adv. Op. 760; 60 Sup. Ct. Rep. 811. (Nos. 346-347, Decided May 6, 1940.)

Twenty-seven corporations and twenty-six individuals were indicted for alleged violations of Section 1 of the Sherman law. The jury returned verdicts of guilty as to sixteen corporations and thirty individuals. The trial court granted new trials to three corporations and fifteen individuals. Final judgment was entered against twelve corporations and five individuals. The corporations were fined $5,000 each and each individual was fined $1,000.

The Circuit Court of Appeals, Seventh Circuit, reversed and remanded for a new trial. Certiorari was granted on petition and cross petition of the government and the defendants. The Supreme Court reversed the judgment of the Circuit Court of Appeals and affirmed that of the District Court for the Western District of Wisconsin.

The opinion of the court was delivered by Mr. Justice Douglas. The first thirty-four pages of his opinion were devoted to a review of the record and an analysis of the facts. Since space is here unavailable to follow the court in the careful and comprehensive analysis of the record, and since the facts are again dealt with in the opinion when the application of the law to the facts is discussed, we pass to that portion of the opinion.

The discussion of the law begins with Chapter IV, "Application of the Sherman Act," and on this subject the court first deals with the charge to the jury. In regard to that phase of the case the learned Justice said:

> "The court charged the jury that it was a violation of the Sherman Act for a group of individuals or corporations to act together to raise the prices to be charged for the commodity which they manufactured where they controlled a substantial part of the interstate trade and commerce in that commodity. The court stated that where the members of a combination had the power to raise prices and acted together for that purpose, the combination was illegal; and that it was immaterial how reasonable or unreasonable those prices were or to what extent they had been affected by the combination. . . .
>
> "The court then charged that, unless the jury found beyond a reasonable doubt that the price rise and its continuance were 'caused' by the combination and not caused by those other factors, verdicts of 'not guilty' should be returned. . . . that knowledge or acquiescence of officers of the government or the good intentions of the members of the combination would not give immunity from prosecution under that Act.
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> "The Circuit Court of Appeals held this charge to be reversible error, since it was based upon the theory that such a combination was illegal *per se*. In its view respondents' activities were not unlawful unless they constituted an unreasonable restraint of trade. Hence, since that issue had not been submitted to the jury and since evidence bearing on it had been excluded, that court reversed and remanded for a new trial so that the character of those activities and their effect on competition could be determined."

The opinion then takes up the cases on which the defendants relied as sustaining the theory adopted by the Circuit Court of Appeals, that reasonable restraint of trade was not illegal.

The *Appalachian Coals* case, the *Sugar Institute* case, the *Maple Flooring Mfrs. Association* case, the *Chicago Board of Trade* case, and the *American Tobacco* and *Standard Oil* cases were all discussed and distinguished,

(Note: All Supreme Court decisions rendered from the recessing of Court on April 8, 1940, up to and including Monday, May 6, are reviewed or summarized in this issue of the Journal. On May 6 the Court recessed to May 20. Eleven opinions were handed down on May 20. These are briefly noted on page V of this issue.)

*Assisted by James L. Homire and Leland L. Tolman.

and the court declared that line of cases not apposite. The conclusion which the court reached in regard to that line of cases is shown by the following quotation:

"Thus in reality the only essential thing in common between the instant case and the *Appalachian Coals* case is the presence in each of so-called demoralizing or injurious practices. The methods of dealing with them were quite divergent. In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. The increase in the spot market prices was to be accomplished by a well organized buying program on that market: regular ascertainment of the amounts of surplus gasoline; assignment of sellers among the buyers; regular purchases at prices which would place and keep a floor under the market. Unlike the plan in the instant case, the plan in the *Appalachian Coals* case was not designed to operate *vis à vis* the general consuming market and to fix the prices on that market. Furthermore, the effect, if any, of that plan on prices was not only wholly incidental but also highly conjectural. For the plan had not then been put into operation. Hence this Court expressly reserved jurisdiction in the District Court to take further proceedings if, *inter alia*, in 'actual operation' the plan proved to be 'an undue restraint upon interstate commerce.' And as we have seen it would *per se* constitute such a restraint if price-fixing were involved."

Others of the cases above referred to were also analyzed and distinguished and the court concluded the review of those cases with the following words:

"Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense. And we reaffirmed that well-established rule in clear and unequivocal terms in *Ethyl Gasoline Corp. v. United States*, No. 536, decided March 25, 1940, where we said:

"Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, . . . and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, . . ."

In connection with the arguments as to the *Trenton Potteries* case, the opinion declared:

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. Where the machinery for price-fixing is an agreement on the prices to be charged or paid for the commodity in the interstate or foreign channels of trade, the power to fix prices exists if the combination has control of a substantial part of the commerce in that commodity. Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. In such a case that power may be established if, as a result of market conditions, the resources available to the combinations, the timing and the strategic placement of orders and the like, effective means are at hand to accomplish the desired objective. But there may be effective influence over the market though the group in question does not control it. Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control. Monopoly power . . . is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under §1 of the Act. The indictment in this case charged that this combination had that purpose and effect. And there was abundant evidence to support it. Hence the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that the buying programs caused or contributed to the rise and stability of prices."

One of the points argued in defense was that the action of defendants was done with the acquiescence and consent of governmental authorities. On that point it was said:

"As to knowledge or acquiescence of officers of the Federal government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§ 2(c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice. Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers. The method adopted by Congress for alleviating the penalties of the Sherman Act through approval by designated public representatives would be supplanted by a foreign system. But even had approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was the source of that approval. As we have seen the buying program continued unabated during the balance of 1935 and far into 1936."

An interesting and comprehensive discussion of the rules of evidence governing the use of a transcript of testimony to refresh the memory of the witness, was reviewed and the error if any was held not to invalidate the verdict.

The effect of alleged misconduct on the part of government counsel in the argument before the jury was examined in the light of the rulings of the court and the circumstances surrounding the situation. It was charged by defendants that the argument appealed to class prejudice and expressed the conviction of counsel that respondents were guilty and that conviction was the wish and desire of the highest officials of the government. It was shown that when objection was made the trial judge sustained the objection and directed the jury to disregard the objectionable statements. In the charge the court warned the jury against convicting a corporation "solely because of its size and extent of its business" and declared "whether a man be rich or poor he is entitled to the same consideration in this court."

To many of the specifications of misconduct of counsel no objection was made on the trial and some of the statements which standing by themselves seemed

objectionable were found to have had a relation to the position taken by opposing counsel which mitigated their effect.

On this point the court said:

"In view of these various circumstances we do not think that the above statements were prejudicial. Standing by themselves they appear to be highly improper. Even as a rebuttal to the defense which had been interposed throughout the trial, they overstep the bounds. But in view of the justification which respondents sought to establish for their acts, the subject matter of these statements was certainly relevant. The fact that government counsel transgressed in his rebuttal certainly cannot be said to constitute prejudicial error. For a reading of the entire argument before the jury leads to the firm conviction that the comments which respondents now rely on for their assertions of error were isolated, casual episodes in a long summation of over 200 printed pages and not at all reflective of the quality of the argument as a whole.

"Respondents further urge as prejudicial error the assertions by government counsel of personal knowledge in contradiction of the record for the purpose of discrediting an important defense witness. The statement of government counsel was that in '1935 and 1936, you couldn't get a rowboat up the Mississippi River, north of Winona.' Respondents contend that testimony as to navigability of that river was vitally material as establishing such outside competition as would have prevented them from raising prices to artificial and non-competitive levels. But such testimony was wholly irrelevant, since the reasonableness of the prices was not properly an issue in the case. Furthermore, when objection was made to the remark, counsel withdrew it and the jury was instructed to disregard it. That must be deemed to have cured the error if it could be considered such. As stated in *Dunlop* v. *United States*, 165 U. S. 486, 498, 'If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand.'"

Other points of procedure are dealt with in the opinion but in view of their relative importance we pass to the objections found on a challenge to the jurisdiction of the court. On that point the court said:

"The Sixth Amendment provides that the accused shall be tried 'by an impartial jury of the State and district wherein the crime shall have been committed.' Respondents contend that the district court for the Western District of Wisconsin had no jurisdiction to try them since the crime was not committed in that district. The Circuit Court of Appeals held to the contrary, one judge dissenting.

"As we have noted, the indictment charged that the defendants (1) conspired together to raise and fix the prices on the spot markets; (2) raised, fixed, and maintained those prices at artificially high and non-competitive levels and 'thereby intentionally increased and fixed the tank car prices of gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin)'; (3) have 'exacted large sums of money from thousands of jobbers' in the Mid-Western area by reason of the provisions of the prevailing form of jobber contracts which made the price to the jobber dependent on the average spot market price; and (4) 'in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area.' . . .

"Conspiracies under the Sherman Act are on 'the common law footing': they are not dependent on the 'doing of any act other than the act of conspiring' as a condition of liability. *Nash* v. *United States, supra,* at p. 378. But since there was no evidence that the conspiracy was formed within the Western District of Wisconsin, the trial court was without jurisdiction unless some act pursuant to the conspiracy took place there. . . . We agree with the Circuit Court of Appeals that there was ample evidence of such overt acts in that district. The finding of the jury on this aspect of the case was also supported by substantial evidence. . . . In sum, the conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the 'continuous cooperation' necessary to keep the conspiracy alive. Hence, sales by any one of the respondents in the Mid-Western area bound all. For a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all without any new agreement specifically directed to that act.'"

Mr. JUSTICE ROBERTS dissented. He said:

"I regret that I am unable to agree to the court's decision. I think that for various reasons the judgment of the District Court should not stand.

"The opinion fully and fairly sets forth the facts proved at the trial, and to its statement nothing need be added. Some of the reasons for my inability to agree with the court's conclusions follow:"

He expressed his agreement with the dissenting judge in the Circuit Court of Appeals that the case should be dismissed for lack of jurisdiction on the ground that the evidence failed to disclose the commission of any overt act in aid of the alleged common enterprise in the district of trial.

Constitutional Law—Freedom of Speech—Picketing

A state statute which declares picketing or loitering about a place of business, with intent to induce others not to trade there, to be a misdemeanor, is an interference with the right of employees to inform the public in an orderly and peaceable manner of the existence of a labor dispute and therefore obnoxious to the constitutional guaranty of freedom of speech.

Thornhill v. Alabama, (84 Adv. Op. 659, 60 Sup. Ct. Rep. 736). No. 514, decided April 22, 1940.

In this case certiorari was allowed to the highest court of Alabama on the petition of one Thornhill who had been convicted of a breach of the Alabama Anti-picketing act, passed in 1923. That act declared picketing (in various changes of language) to be a misdemeanor. The complaint was phrased substantially in the very words of the statute. The case was tried without a jury, one not having been demanded, by the circuit court. At the close of the state's case petitioner moved to exclude all testimony on the ground that the law was violative of the Constitution of the United States. The trial court overruled the motion, found petitioner guilty "of loitering and picketing as charged in the complaint," and entered judgment accordingly. The judgment was affirmed by the Alabama Court of Appeals. The Supreme Court of Alabama denied a petition for certiorari. The allowance of the certiorari in the United States Supreme Court was based upon "the importance of the questions presented."

The evidence showed a typical case of picketing without disorder, threats or violence. Two witnesses testified that they were approached by the pickets "in a peaceful manner", informed that the employees "were on strike and did not want anybody to go up there to work." Both witnesses said that they were not threatened or put in fear.

The opinion of the court was delivered by Mr. Justice Murphy. On the subject of freedom of speech he said:

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and

that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. . . . It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."

After laying down these fundamental principles it was declared that "The section in question must be judged upon its face." This statement was based upon the fact that the indictment was in the language of the statute, that the finding was general, and the case treated by the court and by both parties as involving nothing more than proof of the statutory offense and a test of the constitutionality of the act.

Many cases on freedom of the press were referred to and from those cases analogies were deduced, applicable it was thought to the right of freedom of speech by the spoken word. This part of the opinion was concluded as follows:

"Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

Prior decisions of the state supreme court on the Alabama picketing act were summarized as follows:

"Section 3448 has been applied by the State courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor, the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer. . . . The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute."

The court declared that the words of the statute as construed by the Alabama courts comprehend—

". . . every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer. The phrase 'without just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical. . . . The courses of action, listed under the first offense, which an accused—including an employee—may not urge others to take, comprehends those which in many instances would normally result from merely publicising, without annoyance or threat of any kind, the facts of a labor dispute. An intention to hinder, delay or interfere with a lawful business, which is an element of the second offense, likewise can be proved merely by showing that others reacted in a way normally expectable of some upon learning the facts of a dispute. The vague contours of the term 'picket,' are nowhere delineated. Employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense. In sum, whatever the means used to publicize the facts of a labor dispute, whether by printed sign, by pamphlet, by word of mouth or otherwise, all such activity without exception is within the inclusive prohibition of the statute so long as it occurs in the vicinity of the scene of the dispute."

The opinion thereupon declared the picketing act "invalid on its face." Turning however from an historical study of the right of freedom of speech at the time of the beginnings of our government the court turned to the importance of that doctrine to business and industry at the present day. On this subject it was said:

"It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. . . .

"The range of activities proscribed by Section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. . . . But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

The state had argued in its brief and at the bar that the purpose of this statute was to protect the community from the violence and breaches of peace which it asserted were the concomitants of picketing. The power of the state to protect the lives and properties of its residents was clearly conceded in the opinion but it was declared that danger of that sort was not inherent in picketing, and the court said:

"We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. . . . The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448."

The judgment of the Supreme Court of Alabama was reversed. Mr. Justice McReynolds recorded his opinion that the judgment below should be affirmed.

The case was argued by Mrs. Joseph A. Padway and James J. Mayfield for petitioner and by Mr. William H. Loeb for the respondent.

With the foregoing was also decided *Carlson v. California*, No. 667. The California statute there involved was similar to that of Alabama. The picketing in that case consisted of walking along a portion of United States Highway No. 99 holding up a sign bearing the legend "This job is unfair to CIO." There was no disorder or obstruction of work or traffic, no acts of violence nor breach of the peace. On the authority of the *Thornhill* case it was held that "publicising the facts of a labor dispute in a peaceful way by appropriate means,

whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." But here as in the *Thornhill* case the power and duty of the state to preserve the peace and protect the lives and properties of its residents was declared to be undoubted.

The case was argued by Mr. Laurence W. Carr for appellee, and by Mr. Lee Pressman for respondent.

Public Contracts Act—Determination of Minimum Wages in Manufacturing Locality—Standing to Challenge

Sellers of goods to the Government have no standing to obtain an injunction restraining executive and administrative officials of the Government from enforcing a determination by the Secretary of Labor as to the prevailing minimum wages in a locality which persons selling goods to the Government must agree to pay to their employees, under the Public Contracts Act of 1936.

Perkins v. Lukens Steel Co., 84 Adv. Op. 743; 60 Sup. Ct. Rep. 869. (No. 593, decided April 29, 1940.)

In this case the Court deals with the standing of the respondents to obtain an injunction against executive and administrative officials of the Government in making purchases under the Public Contracts Act of June 30, 1936.

The respondents are seven steel companies named as complainants in a bill brought in the federal court for the District of Columbia whereby they sought to contest the validity of a determination by the Secretary of Labor as to minimum wages required to be paid by persons selling goods to the United States under the Act. The Act provides that sellers must agree to pay employees engaged in producing goods to be purchased by the United States "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which . . . the supplies . . . are to be manufactured or furnished . . ."

The respondents contended that the Secretary had erroneously construed the term "locality" to include a larger geographical area than the Act contemplates. The District Court dismissed the bill, but on appeal the Court of Appeals of the District reversed the judgment and granted a sweeping temporary injunction, but without a bond or other security to pay minimum wages if the appellants should ultimately fail.

On certiorari, the judgment was reversed by the Supreme Court in an opinion by Mr. JUSTICE BLACK.

The opinion recites the proceedings had before the Public Contracts Board and the Assistant Secretary of Labor in arriving at a minimum prevailing wage and in determining what constitutes a "locality." In view of the conclusion of the Supreme Court that the respondents have no standing to maintain their bill, an account of these proceedings is omitted here.

In dealing with the propriety of the injunction granted below, the Court first emphasizes that the injunction allowed extended beyond any controversy between the complaining companies and the Government, interfered with Government business and hampered the carrying out of an important legislative policy. As to this, Mr. JUSTICE BLACK says:

> "In our judgment the action of the Court of Appeals of the District of Columbia goes beyond any controversy that might have existed between the complaining companies and the Government officials. The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the 'locality,' however construed, in which the respondents do business. All Government officials with duties to perform under the Public Contracts Act have been restrained from applying the wage determination of the Secretary to bidders throughout the Nation who were not parties to any proceedings, who were not before the court and who had sought no relief.
>
> "As a result of this judicial action, Federal officials had no feasible alternative except to make contracts for imperatively needed supplies for the War and Navy Departments without inclusion of the stipulation which Congress had required. The Public Contracts Act, so far as the steel industry is concerned, has been suspended for more than a year, with no bond or security to protect the public's interest in the maintenance of wage standards contemplated by Congress, should the suspension ultimately appear unwarranted or unauthorized. Here, and below, the Government has challenged the right of the judiciary to take such action, alleging that it constitutes an unwarranted interference with deliberate legislative policy and with executive administration vital to the achievement of governmental ends, at the instance of parties whose rights the Government has not invaded, and who have no standing in court to attack the Secretary's determination. The manifestly far-reaching importance of the questions thus raised prompted us to grant certiorari."

The opinion then states that the Secretary's determination divided the steel industry into six "localities." Of these six, the respondents did business in the "locality" embracing Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, the District of Columbia, and a part of West Virginia. The complainants stated as their grievance that the construction given by the Secretary to the term "locality" amounted to a plain error of law, and consequently that the determination of minimum wages for employees in the six so-called "localities" was arbitrary and capricious and without warrant of law. Particularly, the complainants alleged that their minimum wages ranged from 53c to 56½c per hour and that to require them to pay 62½c per hour would gravely endanger their ability to compete in obtaining Government contracts, and that if prevented from bidding thereon without payment of the minimum wage as determined they would suffer irreparable damage for which there was no plain, adequate or complete legal remedy.

The Supreme Court finds that the complaint states no cause of action for granting the injunction for the reason that the respondents showed no legal rights of theirs which had been invaded or threatened by the determination complained of. In this connection Mr. JUSTICE BLACK says:

> "We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. It is not enough that the Secretary of Labor is charged with an erroneous interpretation of the term 'locality' as an element in her wage determination. Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political pro-

cess. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law."

The opinion also emphasizes that the legislation governing the matter was not enacted for the protection of sellers and confers no enforcible rights upon prospective bidders. Stress is placed upon the point that the Government enjoys unrestricted power to determine with whom it will deal and to fix the terms and conditions upon which it will purchase supplies. In exposition of this feature the opinion says, in part:

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government —but not private litigants—can complain. . . .
>
> "This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary on the Bill, 'The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops.'"

The opinion also emphasizes sharply that the Act in question is not a regulation of private business and that the respondents were, in effect, seeking through judicial action to interfere with the Government in the handling of its own internal affairs. With reference to this, Mr. JUSTICE BLACK states:

> "The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal."

Mr. JUSTICE MCREYNOLDS was of the opinion that the judgment of the Court of Appeals should be affirmed.

The case was argued by Mr. Solicitor General Biddle for the petitioners, and by Mr. William Clarke Mason for the respondents.

Bankruptcy Act—Section 75—Relation to Foreclosure Proceedings in State Court

In a proceeding under §75 of the Bankruptcy Act as originally enacted the bankruptcy court erroneously permitted a sheriff's sale of the bankrupt's property without a hearing and report of a conciliation commissioner as required by the Act, but did enjoin confirmation of the sale and the delivery of a sheriff's deed. Thereafter parts of §75 were declared unconstitutional. Before the enactment of §75, as amended, the bankrupt caused his petition to be dismissed and the case terminated. Two days later §75 was amended to meet the features previously declared invalid. Later, but before any application was made for reinstatement of the bankruptcy proceeding, the foreclosure proceeding in the state court was brought to a conclusion by confirmation of the sheriff's sale and the delivery of a deed. In these circumstances it was proper for the District Court to refuse to reinstate the bankruptcy proceeding under §75, as amended.

Union Joint Stock Land Bank of Detroit v. Byerly, 84 Adv. Op. 689; 60 Sup. Ct. Rep. 773 (No. 579, decided April 22, 1940).

This case involves a question as to the effect of bankruptcy proceedings under §75 of the Bankruptcy Act in relation to proceedings in a state court for the foreclosure of a mortgage on real estate.

The foreclosure suit was instituted in an Ohio court September 1, 1932, and resulted in a judgment and advertisement of a sheriff's sale to take place November 24, 1934. On November 19, 1934, the mortgagor (respondent) filed a petition in a federal court under §75 of the Bankruptcy Act, and the bankruptcy court restrained proceedings in the foreclosure suit.

On November 23, 1934, the bankruptcy court made an order permitting the sale as advertised, but forbade any further action, particularly confirmation of the sale or the execution of a sheriff's deed. This action was taken without a hearing and report of the conciliation commissioner, which is required by §75(a) as a precedent condition to a sale under a mortgage foreclosure. Various other proceedings were had up to the date of the ruling of the Supreme Court in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, declaring parts of §75(s) unconstitutional on March 27, 1935.

On August 26, 1935, the respondent's petition in bankruptcy was dismissed, because of the ruling in the *Radford* case. Two days later, August 28, 1935, §75(s) was amended, and as amended contained the following provision:

> "This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

September 10, 1935, the Ohio court confirmed the sheriff's sale, and a sheriff's deed was delivered September 11, 1935, and recorded.

On September 24, 1935, the respondent moved to reinstate his bankruptcy case, and the motion was granted, but no amended petition was filed or any adjudication entered under §75(s).

The matter finally reached an appeal to the Circuit Court of Appeals from an order denying respondent's motion for a rehearing on an order of disclaimer of the real estate in question which was made on motion of the petitioner; and also from an order denying the respondent's motion to refer the cause to a conciliation commissioner.

The Circuit Court of Appeals reversed the orders, holding that at the time of filing his new petition the

respondent had a property right, a right of redemption, in the realty which had not been cut off by the sale and confirmation, and that the claim should be referred to a conciliation commissioner.

On certiorari the Supreme Court reversed the judgment, by a divided bench. Mr. JUSTICE ROBERTS delivered the prevailing opinion.

The opinion observes that while it was error for the District Court to permit the sale prior to a reference of the matter to the conciliation commissioner, this did not divest that court of jurisdiction. As to this Mr. JUSTICE ROBERTS says:

"Exclusive jurisdiction of the debtor and his property vested in the District Court on the filing of the petition. Up to that time jurisdiction of the debtor and the mortgaged property was in the State court. Without action by the District Court the State court could not have proceeded further. But without changing the status of the debtor's right of redemption the federal court gave permission to the State officer to hold the sale. The sale was, however, incomplete until confirmation by the court. Until confirmed it amounted to an unaccepted offer to purchase. No sale was consummated while the bankruptcy proceeding was pending.

"In view of the provisions of subsection (o), it was error for the District Court, in the absence of the preliminary steps required by that subsection, to permit the sheriff to hold the sale. But the court had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order. The State court and its officer, the sheriff, were entitled, in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale. The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable, but not void, and was not to be disregarded or attacked collaterally in the State Court."

The Court then gives attention to the effect of the State court's action in confirming the sale in the period intervening between the dismissal of the bankruptcy proceeding and its reinstatement, and concludes that the State court had jurisdiction to proceed as it did, and that its proceedings are not open to attack in the bankruptcy court. Dealing with this the opinion continues:

"The termination of the bankruptcy proceeding restored the jurisdiction and power of the State court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.

"Although the State court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the state court's procedure, it was as if no bankruptcy case had ever existed. With jurisdiction of the parties and the subject matter, the State court entered a decree confirming the sale and authorizing a deed, the sheriff executed his deed, which was duly recorded, and the petitioner went into possession as purchaser of the mortgaged premises. Thereafter the respondent moved for reinstatement of the bankruptcy case and his motion was granted. In the interim, no bankruptcy cause was pending and the State court had jurisdiction to proceed as it did.

"We cannot assent to the view advanced by the respondent that the amendment to §75 of August 28, 1935, automatically reinstated the earlier proceeding which had been dismissed; or that the motion to reinstate the proceeding operated by relation to close the gap of twenty-nine days between the dismissal of the original bankruptcy case and the State court's action in confirming the sale, and to deprive the latter of jurisdiction to act in the interim. The amendatory act merely authorized the reinstatement of proceedings which had been dismissed. The case is analogous to one wherein a state court foreclosure proceeding had been completed and deed delivered to the sheriff's vendee prior to the filing of a petition under §75. The provision for the reinstatement, upon the debtor's motion, of a proceeding theretofore dismissed and finally terminated, cannot affect the jurisdiction of the court conducting the foreclosure proceeding when no bankruptcy cause was pending."

In conclusion, the Court approves the order refusing to refer the cause to a conciliation commissioner, which would have been a vain thing in view of the completion of the foreclosure and the passage of title prior to the reinstatement of the bankruptcy proceedings.

The opinion distinguishes *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, relied on by the dissenting Justices.

Mr. JUSTICE BLACK, Mr. JUSTICE DOUGLAS and Mr. JUSTICE MURPHY delivered a dissenting opinion. They took the view that the cause should have been reinstated in the bankruptcy court, particularly since no rights had intervened which would make it inequitable to reconsider the merits. The dissenting opinion says, in part:

"We believe that to deny this farmer the benefits of the Act because the purchase by the mortgagee at the Sheriff's sale was confirmed during the short interval between the dismissal of his petition and its reinstatement, would be largely to defeat the purposes of the Act.

"After the original subsection (s) of the Frazier-Lemke Act was declared unconstitutional by the decision of this Court, May 27, 1935, this farmer's petition was dismissed, August 26, 1935. A scant two days after the dismissal, August 28, Congress enacted the present Frazier-Lemke Act designed to supply the constitutional deficiency and providing that all cases dismissed because of that decision 'be promptly reinstated.' After the filing of the petition and even before dismissal, the bankruptcy court allowed this farmer's property to be sold by the Sheriff under foreclosure in the State Court. And it is admitted that the order purporting to permit that sale was erroneous because entered in disregard of the requirements of subsection (o). The Ohio State court confirmed the Sheriff's sale, September 10, 1935, a date prior to the lapse of the thirty day period within which an appeal would lie from an order of dismissal.

"Instead of appealing, the farmer, within the thirty day period, prayed relief from the dismissal decree by reinstatement in the District Court itself. In his application for reinstatement, he alleged that dismissal of his petition had been induced by the deliberate misrepresentations of the mortgagee-bank, that he had no notice of the consummation of the Sheriff's sale until several days after it took place and that he wished to avail himself of Section 75 as amended August 28. Upon the prayer 'that his . . . proceeding . . . be reinstated as of the date of its . . . dismissal,' the case was reinstated. We do not understand that either the power of the bankruptcy court to reinstate or the reinstatement which was in fact granted, is questioned.

"Until disposition of the farmer's petition, he was entitled to the protection and benefit of the Act, and the bankruptcy court had exclusive jurisdiction of his property. Dismissal of the proceeding did not constitute its final disposition where reinstatement was available. Certainly, this must hold true at least for the period of time after dismissal during which the farmer had a statutory right to appeal from the District Court's action. Otherwise, even appeal might be wholly unavailing and futile. When a court of bankruptcy reinstates a case previously retired from the docket, as this farmer's case

was reinstated, the court reconsiders the cause on the merits upon the *original* as well as any supplemental petitions unless rights have 'intervened which would render it inequitable to reconsider the merits.' *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137, 138. We find no intervening equities here."

The case was arguel by Mr. Ralph G. Martin for the petitioner, and by Mr. Elmer McClain and Mr. William Lemke for the respondent.

Federal Income Tax—Alimony—Effect of Divorce Decree Discharging Husband's Obligation

Where a wife obtains a final decree of divorce from her husband and the decree of divorce approves a settlement agreement between the parties which embraces the creation of an irrevocable trust for the payment of income to the wife for her life and under the state law the decree and settlement constitute a full discharge of the husband's obligation to support the wife, the income from the trust is not taxable income to the husband under the federal income tax laws.

Helvering v. Fuller, 84 Adv. Op. 715; 60 Sup. Ct. 784. (No. 427, decided April 22, 1940.)

In this case the Court considered a question as to the taxability to the grantor of income from an alimony trust which is payable to his divorced wife. The respondent's wife obtained a Nevada divorce in 1930, under a decree there which "ordered, adjudged, and decreed that" an agreement between the respondent and his wife "be and the same hereby is approved." Under the agreement so approved by the decree, the respondent created an irrevocable trust of shares of stock in a corporation. The duration of the trust was ten years, and the corpus was then to be transferred to the wife outright, or to her heirs, or as appointed by her will. The settlement agreement also provided for the control and custody of children, for other property settlements and for a waiver by the parties of claims arising out of the marital relation.

There was a provision for payment by the respondent to his wife of $40 per week for five years, and thereafter in the event that the respondent's income should be a certain amount.

During 1931, 1932 and 1933 the trustee disbursed all the dividends from the trust for the benefit of the divorced wife. The respondent did not include them in his income tax returns and the Commissioner assessed deficiencies. The Board of Tax Appeals sustained the Commissioner, but the Circuit Court of Appeals reversed.

On certiorari the judgment of the Circuit Court was affirmed by the Supreme Court in an opinion by MR. JUSTICE DOUGLAS, with MR. JUSTICE REED dissenting.

The Court first alludes to the status of the weekly payments of $40, and observes that they are doubtless taxable to the respondent as a continuing personal obligation within the rule of *Douglas v. Willcuts*, 296 U. S. 1.

As to the dividends from the trust, the Government recognized that the Nevada court retained no power to alter the decree, and that accordingly the wife's allowance was final. But it argued that the rule of *Douglas v. Willcuts* should apply since the decree of divorce recognized the husband's preexisting duty to support and defined that duty as coextensive with the agreed settlement, and that the husband had simply carved out future income from his property and devoted it in advance to the discharge of his obligation.

This argument the Court rejects, on the ground that under the state law the trust was a full discharge of the husband's obligation, *pro tanto*. As to this MR. JUSTICE DOUGLAS says:

"We take a different view. If respondent had not placed the shares of stock in trust but had transferred them outright to his wife as part of the property settlement, there seems to be no doubt that income subsequently accrued and paid thereon would be taxable to the wife, not to him. Under the present statutory scheme that case would be no different from one where any debtor, voluntarily or under the compulsion of a court decree, transfers securities, a farm, an office building, or the like, to his creditor in whole or partial payment of his debt. Certainly it could not be claimed that income thereafter accruing from the transferred property must be included in the debtor's income tax return. If the debtor retained no right or interest in and to the property, he would cease to be the owner for purposes of the federal revenue acts. To hold that a different result necessarily obtains where the transfer is made or the trust is created as part of a property settlement attendant on a divorce would be to hold that for purposes of the federal income tax the marital obligation of the husband to support his wife cannot be discharged. But whether or not it can be depends on state law. For other purposes, local law determines the status of the parties and their property after a decree dissolving the matrimonial bonds. And while the federal income tax is to be given a uniform construction of national application, Congress frequently has made it dependent on state law. In the instant situation, an inquiry into state law seems inescapable. For the provisions in the revenue acts and regulations concerning the non-deductibility of "family expenses" and of "alimony" do not illuminate the problem beyond implying the necessity for an examination of local law to determine the marital status and the obligations which have survived a divorce. The Nevada cases tell us that under such a decree as was entered here the obligation to support was *pro tanto* discharged and ended. And the trust agreement contains no contractual undertaking by respondent, contingent or otherwise, for support of the wife. Hence we can only conclude that respondent's personal obligation is not a continuing one but has been discharged *pro tanto*. To hold that it was not would be to find substantial differences between this irrevocable trust and an outright transfer of the shares to the wife, where in terms of local divorce law we can see only attenuated ones. This is not to imply that Congress lacks authority to design a different statutory scheme applying uniform standards for the taxation of income of the so-called alimony trusts. A somewhat comparable statute taxing to the grantor income from a trust applied to the payment of premiums upon insurance policies on his life was upheld in *Burnet v. Wells*, 289 U. S. 670. But the reach of Congressional power is one thing; and interpretation of a federal revenue act based on local divorce law, quite another.

"For the reasons we have stated, it seems clear that local law and the trust have given the respondent *pro tanto* a full discharge from his duty to support his divorced wife and leave no continuing obligation, contingent or otherwise. Hence under *Helvering v. Fitch*, 309 U. S. —, income to the wife from this trust is to be treated the same as income accruing from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation."

In conclusion, the opinion points out that the Court does not pass on the applicability of the rule of *Helvering v. Clifford*, involving a situation wherein the husband retained substantial control over the trust corpus,

but wherein no question was involved as to the husband's obligation to support the wife after divorce.

MR. JUSTICE REED dissented, taking the view that the basis for the decision in *Douglas v. Willcuts* rested not on the husband's continuing liability, but on the "prior appropriation, by the creation of the trust, of future income to meet an obligation of the taxpayer." In developing this distinction MR. JUSTICE REED says:

"It is no answer to the problem to say that if the stock has been transferred outright to the wife the husband would not be liable for the tax. If the stock had been kept by the husband and dividends paid as alimony, he would have been liable. Either analogy might be logically followed in the trust situation but the choice of taxability of trust income was made in *Douglas v. Willcuts*. That case determines the 'general rule.'

"It may be assumed that the original obligation of the husband to support a divorced wife depends upon state law and to that extent that the state law is applicable to the determination of liability under the federal income tax act. But that necessary reliance upon local law need be carried no farther than the determination of obligation to support. Once that is determined the applicability of the theory of constructive receipt of income to discharge the obligation would come into play and would be nationwide in extent.

"The obligation to support exists prior to the divorce decree. It is ended in Nevada only upon getting the court's approval to an arrangement which permits the creation of a fund to meet from year to year the obligation from which the Nevada law then and only then releases the settlor husband. It is by the court's approval that the continuing obligation is discharged. Granting that a lump sum payment would terminate both the marital and the tax liability, the creation of a trust, approved by the court, for continuous payments in lieu of alimony seems to bring the trust income much closer to alimony than to the situation of a final settlement by lump sum payment."

In *Helvering v. Leonard*, No. 426 (decided April 22, 1940), the Court considered another case involving the taxability of income from a trust created by a husband for his wife as an incident to a divorce settlement. The divorce here was granted in New York. The trust included, among other assets, certain bonds which the husband had guaranteed as to principal and interest; he was also to substitute other securities in certain eventualities. The separation agreement included, besides the trust provisions, other terms assuring the wife a stipulated annual income.

The respondent did not include in his income tax return for 1929 income which the trustee received from the trust and distributed to the respondent's wife and children, and the Commissioner determined a deficiency which the Board of Tax Appeals sustained as to the amounts actually distributed. The Circuit Court of Appeals reversed as to the amounts paid to the wife, but sustained the tax liability as to the amounts paid to the minor children.

On certiorari the Supreme Court reversed in an opinion by MR. JUSTICE DOUGLAS, taking the view that the amount paid to the wife was taxable as income to the husband.

In discussing the case the Court emphasizes that the continuing liability of the husband, though contingent, as guarantor of the bonds subject to the trust, was sufficient to support the result reached in *Douglas v. Willcuts*. Dealing with this feature MR. JUSTICE DOUGLAS states:

"The trust agreement contains an express personal obligation of respondent in the form of a guarantee of payment of the principal and interest on $400,000 of the 6% bonds which were part of the trust corpus. To be sure, that personal obligation was contingent. But we do not deem that to be material. We recently stated in *Helvering v. Fitch, supra*, p. —, that under this statutory scheme escape from the rule of *Douglas v. Willcuts, supra*, may be had only on 'clear and convincing proof' that 'local law and the alimony trust have given the divorced husband a full discharge and leave no continuing obligation however contingent.' Whatever may be the correct view on the other aspects of the case, the guarantee was such a continuing obligation. The fact that the wife or other beneficiaries looked primarily to the trust and only secondarily to respondent for payment of $24,000 annually, the fact that respondent's obligation might be enforceable by the trustee, the fact that respondent might never have to make good on his promise, are beside the point. The existence of wholly contingent obligations, whether contractual or otherwise, is adequate to support the results reached in *Douglas v. Willcuts, supra*. For in that case it was manifest that at the time of the creation and approval of the trust the divorce court might never exercise its reserved power to revise or alter the decree and the decree and the husband might never have to make good on his promise to make up deficiencies in the estimated trust income. Likewise, in the instant case, it cannot be said that the divorce decree and the alimony trust gave respondent an absolute discharge from his prior obligation. So far as the guarantee alone is concerned, they permitted his pre-existing unconditional duty to be transformed into a limited contingent one. But nonetheless they placed a specific and adequate sanction on that duty, so that respondent's personal obligation would not be fully discharged at least until complete payment of the principal and interest on the 6% bonds had been made. Thus in effect, if not in form, the trust agreement was security for his continuing obligation which would be discharged at least *pro tanto* as income from those bonds was received by the trustee. Hence the case in substance is the same as those where pursuant to contract or arrangement an obligation is discharged by another for the taxpayer's benefit; . . .; or where the taxpayer creates a trust, the income of which is applied to the discharge of his debt. . . . Here, as there, the taxpayer received a benefit by the payments. The catalogue of benefits is not depleted when primary obligations are discharged. For these reasons that portion of the trust income which was received from the guaranteed bonds was clearly taxable to respondent."

As to the income received from the assets of the trust other than the guaranteed bonds, the Court found that taxable to the husband also, for the reason that the respondent failed to show by "clear and convincing proof" that the divorce court, under the State law, lacks power to add to the respondent's personal obligations in any circumstances. MR. JUSTICE REED concurred for the reasons stated in his dissent in No. 427.

The CHIEF JUSTICE, MR. JUSTICE MCREYNOLDS and MR. JUSTICE ROBERTS voted to affirm the Circuit Court of Appeals.

The cases were argued by Mr. Arnold Raum for the petitioner, and by Mr. Francis W. Cole for respondent.

Bankruptcy Act—Railroad Reorganizations Under §77—Jurisdiction of Bankruptcy Court to Determine Liens for Operating Deficits

In reorganization proceedings under §77, upon rejection of a lease of a railroad the trustees of the lessee are under a duty to continue the operation of the railroad in the event that it is impracticable for the lessor to operate the road. In such case the court having acquired jurisdiction of the lessee is vested with power to determine the amount of the deficit attributable to the continued operation of

the road and to declare the amount thereof a lien on the road in favor of the lessee's estate, notwithstanding that the lessor is undergoing reorganization under §77 in a federal court in another state and that the railroad in question lies outside the state in which the lessee's reorganization proceedings are pending.

Warren v. Palmer, 84 Adv. Op. 752; 60 Sup. Ct. Rep. 865. (No. 643, decided April 29, 1940.)

This case involves a question arising out of the reorganization of the New York, New Haven and Hartford Railroad system. The New Haven was the lessee of the Old Colony Railroad by virtue of a 99-year lease made in 1899. The New Haven was sub-lessee of the Boston and Providence Railroad, also, by reason of a prior lease of the Boston and Providence to Old Colony which was made in 1888 for 99 years.

The New Haven went into reorganization under Section 77 of the Bankrupty Act in the United States District Court of Connecticut in October, 1935, and its trustees rejected the Old Colony lease June 2, 1936. Old Colony filed for reorganization under that section in the same court the next day.

July 19, 1938, the District Court in Connecticut directed the Old Colony trustees to reject the Boston and Providence lease, and on August 4, 1938, the Boston and Providence filed a petition for reorganization in the District Court for Massachusetts.

Previously the system had been operating at a loss and the trustees of the New Haven and the Old Colony asked the District Court in Connecticut to determine the deficit attributable to the Boston and Providence for the period from June 4, 1936, to December 31, 1937, and to declare that amount a first lien on the Boston and Providence in favor of the New Haven and the Old Colony.

The principal question is whether the United States District Court in Connecticut has jurisdiction to grant a lien on the property of the Boston and Providence, while the latter is under reorganization in another bankruptcy court. The District Court ruled that it had jurisdiction to grant the lien, and the Circuit Court of Appeals (second circuit) affirmed. On certiorari this was affirmed by the Supreme Court in an opinion of MR. JUSTICE REED.

The Court observes that the lessee of a railroad may be under duty to operate it for the account of the lessor, after rejection of the lease, by virtue of Section 77 (c) (6), which provides:

> "If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

The opinion then emphasizes that the property of the Boston and Providence was in physical custody of the Connecticut Court, and was in possession of and operated by that Court's trustees during the entire time covered by the claim.

Stress is also placed on the "principles of general application" that courts having custody of property or fund are empowered "to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general disposition among those entitled to receive it."

In these circumstances the Court concludes that the Federal District Court in Connecticut was vested with jurisdiction to grant the lien in question. As to this MR. JUSTICE REED says:

> "If the Connecticut court has possession of the property and operated it under Section 77 (c) (6) for its owners could it fix a lien on the property after another bankruptcy court took the administration of the property? By Section 77 (c) (6) railroads in reorganization which had been operating lines under lease were allowed to reject the lease but required to continue operation of the leased lines if the lessor had no ability to operate. Thus Congress recognized the possible occurrence of the situation now before us and evinced a desire that rail service should not in such a case be interrupted. In view of the public importance of rail service, we think this subsection represents an intention to give the court charged with operation the fullest ability to secure the necessities of operation—an intention to give the operating court power to promise those having the materials, men and equipment needed for operation a first lien on the road to secure payment for the operation. This in no way impairs the operation of Section 77 (a) which grants to the Massachusetts court, 'during the pendency of the proceedings under this section and for the purposes thereof,' 'exclusive jurisdiction of the debtor and its property wherever located,' The 'purposes' of Section 77 include the development of a 'fair and equitable' plan of reorganization. The Massachusetts court is left with jurisdiction to accomplish this, but is bound to recognize the priority of the lien declared by the Connecticut court. By Section 77 (c) (6) the Connecticut court was given jurisdiction so long as it continued to operate the road to grant a lien for operating expenses prior to any existing claims against the road. The decision of the Court of Appeals that the Connecticut court had jurisdiction to grant the lien sought by respondent is affirmed."

The case was argued by Mr. Erwin N. Griswold for the petitioners, and by Mr. Herman J. Wells for the respondents.

State Statutes—Regulation of Insurance Contracts —Requirements as to Resident Agents

The Virginia statute of 1938 prohibiting certain classes of insurance companies, authorized to do business in Virginia, from making contracts of insurance or surety on Virginia risks except through resident agents, and prohibiting the resident agents from allowing more than 50% of their commissions to nonresident brokers, is a valid exercise of the State's police power over the insurance business and is not invalid as an attempted exercise of extraterritorial power.

Osborn v. Ozlin, 84 Adv. Op. 705; 60 Sup. Ct. Rep. 758 (No. 592, decided April 22, 1940).

This case involved the constitutional validity of a Virginia statute regulating the insurance of Virginia risks. The appellants are insurance companies and certain of their salaried employees who sought to enjoin the appellees, state officials, from enforcing the statute.

The challenged act, passed in 1938, forbids contracts of insurance or surety by companies authorized to do business in Virginia "except through regularly constituted and registered resident agents or agencies of such companies"; and requires that resident agents "shall be entitled to and shall receive the usual and customary commissions allowed on such contracts." The resident agent may allow no more than 50% of his commission

to a non-resident broker. The requirements challenged are not applicable to life, title and ocean marine insurance companies.

A specially constituted Federal District Court of three judges heard the cause, took evidence, made findings of fact and stated conclusions of law. On the findings and conclusions the bill was dismissed. On appeal the decree was affirmed by the Supreme Court in an opinion by MR. JUSTICE FRANKFURTER, with three Justices dissenting.

The opinion summarizes the findings of the District Court describing the methods of production of insurance and the servicing of policies after they are put into effect. Particular emphasis is placed on the difference between production through agents as contrasted with brokers. This aspect is described in the opinion as follows:

"The 'production' of insurance—'production' being insurance jargon for obtaining business—is, in the main, carried on by two groups, agents and brokers. Though both are paid by commission, the different ways in which the two groups perform their functions have important practical consequences in the conduct of the insurance business, and hence in its regulation. The agent is tied to his company. But his ability to 'produce' business depends upon the confidence of the community in him. He must therefore cultivate the good will and sense of dependence of his clients. He may finance the payment of premiums; he frequently assists in the recovery of claims; he acts as mediator between insurer and assured in the diverse situations which arise. The broker, on the other hand, is an independent middleman, not tied to a particular company. He meets more specially the needs of large customers, using their concentrated bargaining power to obtain the most favorable terms from competing companies. His activities, being largely confined to the big commercial centers, take place mostly outside Virginia.

"A policy, whether 'produced' by broker or agent, must be 'serviced'—an insurance term for assistance rendered a customer in minimizing his risks. To this end the companies exert themselves directly, but the 'producer' may render additional service. Only to a limited extent can risks be minimized at long range; local activity is essential. When the contract is 'produced' by a non-resident broker the 'servicing' function is normally performed by the company exclusively. When the 'producer' is a resident agent, the case is ordinarily otherwise. For this, as well as for other reasons, it is obvious that non-resident brokers prefer to negotiate their contracts covering Virginia risks with companies authorized to do business in that Commonwealth.

"These basic elements in the insurance business attain special significance in the case of enterprises operating not only in Virginia but in other states as well. For them the brokerage system offers the attractions of large-scale production. Through what is known as a master of 'hotchpotch' policy, the assured may obtain a cheaper rate by pooling all his risks, whether in or out of Virginia. This wholesale insurance may furnish not only a reduced rate by a reduced commission to the customer. These are advantages which naturally draw the Virginia business of interstate enterprises away from local agents in Virginia to the great insurance centers."

The Court concludes that the legislation in question is not invalid as a measure to regulate contracts outside the State, but is an admissible regulation of a matter properly within the police power of Virginia. In exposition of this view the opinion proceeds:

"Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it.

"A network of legislation controls the surety and casualty business in Virginia. . . . The difficulty of enforcing these regulations, so the District Court found, may be increased if policies covering Virginia risks are 'produced' without participation by responsible local agents. Rebates evading local restriction may be granted under cover of business done outside the state. Contrariwise, if resident Virginia agents are made necessary conduits for insurance on Virginia risks now included in master policies, the state may have better means of acquiring accurate information for the effectuation of measures which it deems protective of its interests.

"It is claimed that the requirement that not less than one-half of the customary commission be retained by the resident agent is a bald exaction for what may be no more than the perfunctory service of countersigning policies. The short answer to this is that the state may rely on this exaction as a mode of assuring the active use of resident agents for procuring and 'servicing' policies covering Virginia risks. These functions, when adequately performed, benefit not only the company, the producer, and the assured. By minimizing the risks of casualty and loss, they redound in a pervasive way to the benefit of the community. At least Virginia may so have believed. And she may also have concluded that an agency system, such as this legislation was designed to promote, is better calculated to further these desirable ends than other modes of 'production.' When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts."

MR. JUSTICE ROBERTS delivered a dissenting opinion in which the Chief Justice and MR. JUSTICE MCREYNOLDS concurred. Emphasizing that the intent of the law is to compel a non-resident insurance company to pay a local resident for a service not rendered by him, the opinion states:

"The purpose and effect of the statute is to compel an insurance company which is a citizen of another state, and which negotiates a contract of insurance with an agent or broker within such other state, to pay a resident of Virginia for a service not rendered by him, but rendered by another in another state. By force of the statute a Virginia agent must countersign a contract negotiated outside of Virginia with an assured whose residence is outside of Virginia, which contract of insurance was negotiated by an agent or broker living outside of Virginia. The countersigning Virginia agent must be paid one-half the usual commission, even though the broker or agent who produced the business is licensed as a non-resident broker by Virginia, although the only service such Virginia agent is required to render, and in many cases all he does render, is the mere countersignature of the policy.

. . .

"The plain effort of Virginia is to compel a nonresident to pay a resident of Virginia for services which the latter does not in fact render and is not required to render. The principles underlying former decisions of this court are at war with the existence of any such asserted power."

The case was argued by Mr. John Lord O'Brian for the appellants, and by Mr. Abram P. Staples for the appellees.

Constitutional Law: Controversies Between the States—Water Rights

The right of Colorado to divert water from the Laramie river has heretofore been adjudicated to be not more than 39,750 acre feet per annum. Former decisions approving transfer of specific amounts of water from one area to another, state relative amounts only and do not warrant an increase of total authorized diversions. Proof of damage consequent upon excessive diversions is not essential in a proceeding to enforce a prior decree by contempt proceedings and is not an admissible defense; the court may, however, consider whether the diversions were made in a period of uncertainty and misunderstanding and if so will take those circumstances into consideration as extenuation.

Wyoming v. Colorado, (84 Adv. Op. 725; 60 Sup. Ct. Rep. 765) (Original 10, decided April 22, 1940).

This case involves a controversy between Wyoming and Colorado as to the amount of water which Colorado might divert from the Laramie river.

Certain of the points involved in this controversy were disposed of by reference to the decisions of the Supreme Court in prior cases between the same parties in which those points had been adjudicated. One of these points was the right to determine the amount of water which ultimately returned to the Laramie river after its use for purposes of irrigation in Colorado, and to credit to Colorado the amount of the return.

The court held that this matter had been seriously considered in framing a former decree (298 U. S. pp. 581-582), that the possible uncertainty of amount of water that might ultimately be returned was taken into account; and that it was intended that the amount diverted should be measured at the river gates and that no credit could be allowed for water which may have found its way back into the river.

Another controversy arose as to the effect of a prior decree which fixed the amount of permissible diversion on a former occasion in a particular district at a definitely stated number of acre feet, but the prior decree was interpreted in view of the circumstances involved in the former litigation, and the amount there stated was held to be relative and not absolute and afforded no measure of the rights in the case at bar if the total diversions, however distributed, exceeded the maximum limit of 39,750 acre feet fixed by the decree in the fundamental case.

After the court had cleared away the controversies which had formerly been determined the situation was summarized as follows:

> "We conclude that the decree is not violated in any substantial sense so long as Colorado does not divert from the Laramie River and its tributaries more than 39,750 acre feet per annum.
>
> "In 1939, however, Colorado diverted more than that total amount. Apparently no question had been raised by Wyoming as to the diversions in 1937 and 1938. It is undisputed that when the diversions in 1939 reached 39,865.43 acre feet on June 19th, Colorado closed the headgates of the various appropriations within that State. But Wyoming alleges that Colorado wrongfully permitted the headgates to be reopened on June 22d and to remain open until July 11th, thus permitting the diversion of 12,673 acre feet in excess of the aggregate amount allowed to Colorado, despite Wyoming's protest."

There remained for disposition two defenses urged by Colorado. The first of these was that Wyoming was not injured by the diversion but this defense was held not admissible. The court said:

> "That there was this excessive diversion is not controverted. Colorado insists that Wyoming has not been injured. But such a defense is not admissible. After great consideration, this Court fixed the amount of water from the Laramie river and its tributaries to which Colorado was entitled. Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights. If nothing further were shown, it would be our duty to grant the petition of Wyoming and to adjudge Colorado in contempt for her violation of the decree."

The second of these defenses was that the diversions during the season of 1939 were made with Wyoming's acquiescence and that was held to be the only available defense. As to this defense the court said:

> "That is the sole available defense. To support it, Colorado has presented affidavits showing communications between an association of meadowland appropriators and the special hydrographer of Wyoming and also stating that at a conference in the office of the Governor of Colorado on July 1, 1939, the officers of Wyoming said that they had no objection to continued diversions being made through the meadowland ditches for the reason that a great portion of the water so diverted returned to the Laramie river to be used downstream by Wyoming appropriators. Wyoming presents affidavits to the contrary, setting forth her demands. It is unnecessary to review in detail the points in controversy. In the light of all the circumstances, we think it sufficiently appears that there was a period of uncertainty and room for misunderstanding which may be considered in extenuation. In the future there will be no ground for any possible misapprehension based upon views of the effect of the meadowland diversions or otherwise with respect to the duty of Colorado to keep her total diversions from the Laramie river and its tributaries within the limit fixed by the decree."

The petition of Wyoming for attachment to punish the State of Colorado for the excessive diversions as a contempt of the court was denied and costs ordered equally divided.

The case was argued by Mr. Byron G. Rogers for defendant, and by Mr. Ewing T. Kerr for complainant.

State Statutes—Anti-Trust Laws—Exemption of Farmers and Stockmen

The Texas anti-trust act condemning conspiracies to fix prices in restraint of trade is not rendered unconstitutional under the Fourteenth Amendment to the Federal Constitution by reason of the fact that it exempts from its operation agricultural products or livestock in the hands of the producer or raiser.

Under that Amendment the State may create civil remedies against combinations in restraint of trade and make the civil remedies available against farmers and stockmen while exempting them from the operation of the criminal act covering the same subject.

Tigner v. The State of Texas, 84, Adv. Op. 756; 60 Sup. Ct. Rep. 879. (No. 635, decided May 6, 1940.)

This appeal was brought to challenge the constitutional validity of a Texas anti-trust law. The appellant was charged with participation in a conspiracy to fix the retail price of beer in violation of Title 19, Chapter 3, of the Texas Penal Code. Because this statute does not apply "to agricultural products or livestock in the hands of the producer or raiser," the appellant contested the validity of the entire statute and sought release on a writ of *habeas corpus.* His contention was rejected by the Texas Court of Criminal Appeals and on further appeal the Supreme Court affirmed the judgment in an opinion by Mr. Justice Frankfurter.

It is pointed out that the appellant's contention is

based on the ruling in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 539, which condemned a like provision as repugnant to the equal protection of the laws guaranteed by the Fourteenth Amendment. The State Court recognized that the statutory exemption complained of is identical with that found fatal in the Illinois statute condemned in the *Connolly* case. It concluded, however, that time and circumstances call for a different answer.

The opinion of Mr. JUSTICE FRANKFURTER summarizes the question presented as follows:

> "May Texas promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture?"

In arriving at an answer the Court observes that legislation of this character had its origin in the fear of concentrated industrial power following the Civil War, and cites differences in fact between combinations of farmers and stockmen on the one hand and industrialists and middlemen on the other as affording a basis for different legislative classifications in the anti-trust laws. The legislative movement in this direction is alluded to as evidenced by laws sanctioning cooperative action by farmers, restricting their amenability to anti-trust laws, in relieving their organizations from taxation, and in controlling the supply and price of agricultural commodities. Economic forces stimulating this movement are found to justify the overruling of the *Connolly* case. Referring to the legislative enactments cited, Mr. JUSTICE FRANKFURTER adds:

> "At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. *Connolly's* case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling."

A further contention advanced by the appellant was based on the fact that other anti-trust legislation in Texas, which imposes civil penalties, contains no exemption of farmers and stockmen. The appellant contended that the divergence between the civil and criminal laws relating to the same conduct undermines the validity of the exemption in the criminal statute and thus makes the whole of it invalid. The Court views this contention as a claim that to permit substantive differentiation in legislative policy precludes differentiation in remedy. This argument the Court rejects, finding no constitutional objection to the exemption of farmers and stockmen, and none to partial rather than complete exemption.

Mr. JUSTICE MCREYNOLDS voted to reverse the judgment.

The case was argued by Mr. Charles I. Francis for the appellant, and by Mr. George W. Barcus and Mr. Lloyd Davidson for the appellee.

State Statutes—Regulation of Building and Loan Associations—Restrictions on Stockholders' Right of Withdrawal

The statute of New Jersey passed in 1932 altering and restricting the rights of shareholders in state building and loan associations to withdraw their shares is sustained as consistent with the contract clause of the Federal Constitution as a valid exercise of the State's police power over building and loan associations, notwithstanding that the statute is legislation of a permanent character.

Veix v. Sixth Ward Bldg. and Loan Assn. of Newark, N. J., 84 Adv. Op. 685; 60 Sup. Ct. Rep. 792. (No. 567, decided April 22, 1940.)

This case deals with the validity of an Act of New Jersey passed in 1932, affecting state building and loan associations, which the appellant challenged as repugnant to the contract clause of the Federal Constitution.

The appellant purchased prepaid shares in the appellee association in 1928 and 1929. At that time the state statutes provided that shareholders might withdraw and be paid the amount of their shares, under prescribed statutory terms and procedure. The legislation of 1932 changed the terms and procedure by imposing substantial restrictions on the right of withdrawal. The appellant sought to recover, by suit, the amount of his shares under the law as it existed prior to the 1932 legislation, contending that that legislation was unconstitutional under the contract clause. The New Jersey courts sustained the Act of 1932 and dismissed the complaint.

On appeal the judgment was unanimously affirmed by the Supreme Court in an opinion by MR. JUSTICE REED. The opinion recognizes that the law of 1932 alters the rights of shareholders, but concludes that the challenged regulations are within the police power of the State, although not temporary emergency legislation. In this connection MR. JUSTICE REED says:

> "While the act of 1932 now under review was not emergency legislation, the dangers of unrestricted withdrawals then became apparent. It was passed in the public interest to protect the activities of the associations for the economic welfare of the State. It is also plain that the 1932 act was one of a long series regulating the many integrated phases of the building and loan business such as formation, membership, powers, investments, reports, liquidations, foreign associations and examinations. We are dealing here with financial institutions of major importance to the credit system of the State.
>
> "With institutions of such importance to its economy, the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares. Unquestionably for the future, the provisions of the 1932 act would be effective. We think they were equally effective as to shares bought prior to the enactment of the statute. notwithstanding the provisions of Article 1, Section 10 of the Constitution that "No State shall . . . pass any . . . Law impairing the obligation of the Association to respond to the application for withdrawal was subject to the paramount police power. Beginning with the 1903 act the State of New Jersey has laid down specifically by statute the requirements for withdrawal. The charter, by-laws and membership cer-

tificate ceased to determine withdrawal rights. It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."

Home Building & Loan Association v. Blaisdell, 290 U. S. 398, and other cases are cited dealing with temporary legislation passed in the face of emergencies. But the police power is held adequate to support *permanent* legislation as well, in order to protect the vital economic necessities of the people. With reference to this the opinion states:

"We think of emergencies as suddenly arising and quickly passing. The emergency of the depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue. When the 1932 act was passed commercial and savings banks, insurance companies and building and loan associations were suffering heavy withdrawals. The liquid portion of their assets were being rapidly drained off by their customers, leaving the long term investments and depreciated assets as an inadequate source for payment of the remaining liabilities. An acceleration or a continuance of this tendency to withdraw available funds threatened a quick end to the ability of the institutions to meet even normal demands. Such threatened insolvency demands legislation for its control in the same way that liquidation after insolvency does. Such legislation may be classed as emergency in one sense but it need not be temporary."

MR. JUSTICE MCREYNOLDS concurred in the result.

The case was argued by Mr. Walter P. Reilly and Mr. James L. Handford for the Appellant, and by Mr. Fred G. Stickel, Jr., and Mr. Louis J. Cohen for the appellee.

Raker Act—Construction and Validity

The Act of Congress known as the Raker Act, which granted to the City and County of San Francisco certain rights in national parks to enable the grantees to maintain a water supply and to establish a system for generating, selling and distributing electrical power upon condition that the rights granted should not be transferred to any private corporation, is construed to prohibit the City from selling and distributing the electrical power through a private utility corporation. As so construed the statute is sustained as a valid exercise of congressional power for the enforcement of which appropriate equitable relief will be granted.

United States v. City and County of San Francisco, 84 Adv. Op. 697; 60 Sup. Ct. 749. (No. 587, decided April 22, 1940.)

In this case the Supreme Court construed certain provisions of an Act of Congress known as the Raker Act and allowed equitable relief to enforce the Act, as construed. By that Act Congress granted to the City and County of San Francisco certain lands and rights-of-way in Yosemite and Stanislaus National Parks. The grant, known as the "Hetch-Hetchy" grant, was intended for use by the City in constructing and maintaining a means of water supply and to establish a system for generating, selling and distributing electricity.

The grant was subject to the following condition against resale or subletting, set forth in Section 6:

"That the grantee (the City) is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

The District Court concluded that the City was violating the condition by the sale of power through the Pacific Gas and Electric Company, a private utility, and by injunction required the City to discontinue the practice or to cease further use of the property granted. The Circuit Court of Appeals reversed, in the view that the private utility was acting merely as the City's agent in the sale and distribution of the power, consistently with the grant.

On certiorari, the Supreme Court reversed the judgment of the Circuit Court and affirmed that of the District Court, in an opinion by MR. JUSTICE BLACK.

The opinion first analyzes the terms of the grant and the conclusion is reached, both on the basis of the language and history of Section 6, that the conditions of the grant forbid not only selling or letting to any private corporation, but the "right to sell or sublet." The Court's conclusion as to this is stated as follows:

"In brief, the City does not itself distribute and sell the power directly to consumers; it has not provided competition with the private power company; and it has transferred the right to sell and distribute the power to a private power company in violation of the express prohibition of Section 6 of the Act.

"Terminology of consignment of power, rather than of transfer by sale, and verbal description of the power Company as the City's agent or consignee, are not sufficient to take the actions of the parties under the contract out of Section 6. Congress, in effect trustee of public lands for all the people, has by this Act sought to protect and control the disposition of a section of the public domain. The City has in fact followed a course of conduct which Congress, by Section 6, has forbidden. Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law. When we look behind the word description of the arrangement between the City and the power company to what was actually done, we see that the City has—contrary to the terms of Section 6—abdicated its control over the sale and ultimate distribution of Hetch-Hetchy power."

The opinion discussed also the City's contention that the prohibitions of Section 6 are an unconstitutional invasion of the rights of California, that they are to be considered as covenants in a contract between the City and the United States, which equitable defenses render unenforceable. This argument is rejected. Denying that Congress has sought to exercise general control over the State's public policy, and sustaining the prohibitions under Art. 4, Sec. 3, Cl. 2 of the Constitution, Mr. JUSTICE BLACK says:

"Article 4, Section 3, Cl. 2 of the Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.' The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.' Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydroelectric power in such public lands may,

if Congress chooses, be one designed to avoid monopoly and to bring about a wide-spread distribution of benefits. The statutory requirement that Hetch-Hetchy power be publicly distributed does not represent an exercise of a general control over public policy in a State but instead only an exercise of the complete power which Congress has over particular public property entrusted to it."

In conclusion, the Court considers and rejects the City's position that a balancing of the equities calls for the denial of an injunction.

MR. JUSTICE MCREYNOLDS dissented.

The case was argued by Mr. Assistant Attorney General Littell for the petitioner, and by Mr. Garret W. McEnerney and Mr. John J. O'Toole for the respondent.

State Statutes—Regulation of Two Story Trucks—State Regulations Not Superseded by Federal Motor Carrier Act of 1935

Section 1033(c) of the Pennsylvania Vehicle Code which prohibits the operation on state highways of any vehicle carrying any other vehicle above the cab of the carrying vehicle or over the head of the latter's operator is a valid exercise of the State's police power over highways of the State and has not been superseded by the provisions of the Federal Motor Carrier Act of 1935 or by any regulations of the Interstate Commerce Commission promulgated thereunder.

Maurer v. Hamilton, Jr., 84 Adv. Op. 671; 60 Sup. Ct. 726. (No. 380, decided April 22, 1940.)

The principal question in this case is whether federal regulations have superseded a statute of Pennsylvania which excludes from state highways "a vehicle . . . carrying any other vehicle, any part of which is above the cab of the carrier vehicle or over the head of the operator of such carrier vehicle." The state courts sustained the validity of the statute against contentions that it had been superseded by regulations of the Interstate Commerce Act promulgated under the Motor Carrier Act of 1935.

On appeal, the ruling was affirmed by the Supreme Court in an opinion by MR. JUSTICE STONE. He points out that the record establishes a firm foundation for the validity of the Act as a safety regulation within the state's police power. The vital question was whether the federal statute, or action authorized by it, has superseded the state law.

An analysis of the Motor Carrier Act of 1935 led to the conclusion that the state law had not been superseded. The Court recognizes that by §204 (a) the Commission is empowered to regulate carriers by motor vehicle and to establish reasonable requirements for certain specified phases of the business including "safety of operation and equipment," and as to private contract carriers the Commission is placed under a duty to establish "standards of equipment."

However, as to the matter of sizes and weight of motor vehicles and combinations of motor vehicles, the commission was by Section 225 authorized merely "to investigate and report on the need for Federal regulation."

In view of this language, and of the history of the Act, the Court states its conclusion, as follows:

"Reading the words of §225 in the light of its legislative history, and mindful of the peculiar conditions of the traffic and the problems of state regulation to which the section must be applied, and of its obvious purpose to postpone until the report of the Commission's determination of the extent to which Congress should withdraw from the states their power to regulate sizes and weight of motor vehicles, we cannot say that the phrase as used in the statute is restricted to overall measurements or gross weight, or that it does not include particular dimensions of motor vehicles and their loads and the distribution of load, which affect safety as well as the wear and tear of the highways. We conclude that the Pennsylvania statute now before us is a weight and size regulation within the meaning of §225, and is within the regulatory authority of the state reserved by that section from the authority granted to the Commission by §204."

The case was argued by Mr. Sterling G. McNees and Mr. Edmund M. Brady for the appellants, and by Mr. George W. Keitel for the appellees.

Summaries

National Banking Associations—Authority to Secure Deposits by Pledge of Assets

City of Yonkers v. Downey, 84 Adv. Op. 681, 60 Sup. Ct. Rep. 796. (Nos. 542, 545, decided April 22, 1940.)

Certiorari was granted to review a judgment that a National Bank located in New York State, which before its insolvency had pledged bonds to secure certain public funds deposited in it, and which subsequently, after the bank holiday of March 1934, did not open for unrestricted business but was placed in the hands of a conservator and later of a receiver, and which, between the close of the bank holiday and the time of the receiver's appointment, had permitted the depositor to withdraw the funds secured by the pledge and had then retaken the pledged bonds, had by that action given an intentional preference to creditors when the bank was in fact insolvent; and that the receiver was therefore entitled under the National Banking Act to recover as an unlawful preference the difference between the amount paid general creditors and the amount of the total withdrawal.

The Court's opinion by MR. JUSTICE MCREYNOLDS affirms the judgment. It holds that there is no reason to disagree with lower court findings of inability to pay depositors in due course at the time of the withdrawal and of intent to give preference and that, unless empowered by the Act of June 25, 1930, or concerning Federal funds (not here involved), national banks may not secure deposits by pledge of assets, and, in case of insolvency, assets so pledged may be reclaimed without payment of the deposits.

As to the Act of June 25, 1930, permitting national banks to give security for public deposits "of the same kind as is authorized by the law of the state in which such association is located in the case of other banking institutions in the State", which it was argued "authorized" New York banks to pledge bonds to secure public deposits, because, under local decisions, pledges by state banks, although "contrary to law and beyond the power and authority vested in the officers", will not be set aside unless deposits made in reliance upon it are first paid, the opinion points out that authority to do a forbidden thing can not be inferred from capacity to accept the prescribed consequences.

The case was argued on Feb. 29, 1940, by Leonard G. McAneny and E. J. Dimock for petitioners and by George P. Barse for respondent.

ANOTHER REGIONAL CONFERENCE OF SOUTHERN STATES

Bar Leaders of Louisiana, Arkansas, Mississippi, Oklahoma, and Texas Meet at New Orleans —Broad Program of Association Activities—Bar Integration Discussed—Legal Institutes—Unauthorized Practice

ON Saturday, March 23, there was held in New Orleans a Regional Conference of state and local bar association executives embracing representatives of the local bars of Arkansas, Louisiana, Mississippi, Oklahoma, and Texas, who met with the members of the House of Delegates of the American Bar Association from these states. This meeting was held under the auspices of the Section of Bar Organization Activities of the American Bar Association with Raymer F. Maguire of Orlando, Florida, as chairman and W. W. Young of New Orleans as council member, presiding. The meeting was exceptionally well received, more than seventy-five lawyers being in attendance.

The purposes of the meeting were explained by Chairman Maguire as being to create a closer relationship between the American Bar Association and the local bar associations and to coordinate their activities for the betterment of the profession. The keynote of the whole meeting was one of the public service aspect of the bar. Chairman Maguire and all of the speakers emphasized in one way or another the lawyer's position as a public servant and the bar's responsibilities to the public. It was stressed by the chairman that this duty could only be discharged under modern conditions by proper bar organization and that the integrated bar appeared to be the best method of bar organization to secure a maximum of public service. At this point Chairman Maguire called on each of the bar executives present to give a report on the form and activities of their association.

Review of Bar Organization and Activities

Angus G. Wynne of Houston, President of the Texas Bar Association, reported that the Texas Bar had been

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Summaries of Supreme Court Decisions

(*Continued from page 529*)

Taxation—Colorado Public Revenue Service Tax Act—Validity in Relation to National Banks

Colorado National Bank of Denver v. Bedford, 84 Adv. Op. 730; 60 Sup. Ct. Rep. 800. (No. 719, decided April 22, 1940.)

This was an appeal to determine the validity of a statute of Colorado known as the Public Revenue Service Tax Act in its application to national banking corporations. The Act, Sec. 5 (c), imposes a tax equivalent to 2% of the value of services rendered by banks, finance companies, trust companies and depositories. The person rendering the service is made responsible for payment, but is required to bill it as a separate item and forbidden to hold out that he will absorb the tax. As construed by state authorities, the tax does not reach so-called "banking services," but it is held to be applicable to the service of furnishing safety vaults by depositories or banks.

The appellant bank challenged the validity of the Act as applied to its safety deposit business, and the State Treasurer brought action under the Uniform Declaratory Judgments Act for a declaratory judgment. The State courts sustained the tax as applied.

On appeal the judgment was affirmed by the Supreme Court in an opinion by MR. JUSTICE REED. The Court's opinion considers four features of the appeal, and concludes that: (1) a federal question was involved and properly presented for decision; (2) the safe keeping of valuables is a banking function authorized by Congress for performance by national banks; (3) the present tax is not on the bank, but on its customers, and is, therefore, not forbidden by the Constitution or laws of the United States; and (4) the requirement that the banks shall collect and remit the amount of the taxes does not impose an unconstitutional burden on the bank, especially in view of the fact that the bank is allowed 3% of the amount collected for performing the service.

The case was argued by Mr. Walter P. Reilly and Mr. James L. Handford for the appellant, and by Mr. Fred G. Stickel, Jr., and Mr. Louis J. Cohen for the appellee.

Contracts—Damages—Western Union Standard Money Order Contract Clause for Limitation of Liability Construed

Western Union Telegraph Co. v. Paul Nester & Juan Charles. 84 Adv. Op. 711, 60 Sup. Ct. Rep. 769. [No. 597, decided April 22, 1940.]

Certiorari was granted here to review a judgment of the California district court holding that because of the terms of the standard money order contract of the Western Union Telegraph Company, that "in any event the company shall not be liable for damages for delay, non-payment or underpayment of this money order . . . beyond the sum of five hundred dollars in which amount the right to have this money order promptly and correctly transmitted and promptly and fully paid is hereby valued," the sender of an order for $150.00 who in his complaint claims damages for non-delivery amounting to $7,600 and who at the trial does not prove any special damage, may nevertheless recover the stipulated amount of $500 as liquidated damages to which he is entitled under the contract in case of default in service regardless of whether or not he has sustained any actual damage.

The opinion of the Court by MR. JUSTICE MCREYNOLDS holds that this judgment must be reversed, since the provision in question is not intended to prescribe a definite liability for liquidated damages, but is instead a limitation upon the maximum permissible recovery for actual loss or damage properly alleged and shown by evidence.

The case was argued on March 8, 1940, by Francis Raymond Stark for petitioner and submitted by Earl C. Demos for respondents.

integrated since last year with a membership of seventy-three hundred lawyers, and that they had just completed the rules to govern the newly integrated bar and the property and business of the voluntary bar association would be taken over on July 4-6 at the annual meeting.

W. E. Morse, Vice-president of the Mississippi Bar Association, reported that the Mississippi Bar was integrated with a membership of seventeen hundred lawyers, that the next meeting would be in Jackson, Mississippi, on June 26, and that the experiment seemed to be very successful.

John E. Luttrell, President of the Oklahoma Bar Association, reported for Oklahoma that in 1939 the legislature repealed the state bar act and the Oklahoma Supreme Court under its rule-making power provided for the integration of the Oklahoma Bar, which then met and patterned its organization after the American Bar Association. Mr. Luttrell reported that the Oklahoma Bar Association is attempting to stimulate interest in county bar work, in a journal, and in legal institutes.

Frank S. Quinn, Chairman of the Membership Committee of the Arkansas Bar Association, reported that in Arkansas the Supreme Court requires every lawyer to become a member of the Supreme Court Association and that it has adopted the rules of ethics announced by the American Bar Association.

W. W. Young, council member, Section of Bar Organization Activities of the American Bar Association, reported on the peculiar situation which exists in the State of Louisiana in which there is an integrated bar not recognized by the American Bar Association and a voluntary bar association to which recognition is accorded. Mr. Young reported that the Louisiana legislature will be asked in May to repeal the act integrating the Louisiana Bar and that this movement is supported by resolutions of the executive committees of both the Louisiana and the New Orleans Bar Associations, and there is every reason to believe that the bar integration act will be repealed at that time.

Sumter D. Marks, secretary of the New Orleans Bar Association, pointed out that it was the opinion of his Association that bar integration could better be achieved in Louisiana under the Supreme Court than through legislative act.

Chairman Maguire then asked Charles E. Dunbar, Jr. of New Orleans to report on the subject of cooperation between bar examiners, law schools and bar associations in conducting bar examinations. Mr. Dunbar pointed out the need for coordination of the subject-matter of study between the bar examiners and the law school professors who have different ideas of content and of the emphasis in legal education. Mr. Dunbar declared that it was the purpose of his committee to bring together the bar examiners and law professors so that these divergent views could be synchronized. The same difficulty exists with regard to the kind and type of bar examinations, Mr. Dunbar pointed out. Law professors complain that the bar examiners are not using modern methods in examination technique, and make their questions too difficult or too easy. In both of these instances of content and form of examination the student is the victim, as he is prepared under one theory and examined under another. Mr. Dunbar said that his committee would recommend that the local bar associations take the initiative in forming "committees on cooperation" composed of representatives of bar examiners, law schools and bar associations to be a clearing house for the discussion of these problems.

After Mr. Dunbar reported, Chairman Maguire called on Dean Paul Brosman of the Tulane Law School to express the view of university faculties on this subject. Dean Brosman stated that the law schools welcomed the things that the Section on Legal Education and Admissions to the Bar is trying to do. He pointed out that law teachers have little contact with practical law and that they can therefore profit from discussions of matters of curriculum content with lawyers, while on the other hand lawyers can profit from law teachers in matters of examination method.

President Beardsley suggested that the state bar should create a committee of cooperation of bar examiners, lawyers and law teachers, and recommended further that a Conference of Legal Education and Admissions to the Bar should be a topic on every state bar association's calendar for the general meeting. President Beardsley remarked that ordinarily he was in favor of small committees, but that in this case the committee should act as a sort of continuing conference and general clearing house for bar admission problems and should be relatively large. After a general discussion in which it developed that none of the bar associations represented had "cooperation committees," Chairman Maguire called up the next topic for discussion, which was cooperation between the bar and the legislature.

A most interesting discussion on this subject was contributed by David A. Simmons of the Texas bar. He said that the experience of the Texas bar was that they could get none of their bills passed by the Texas legislature, that a bill sponsored or approved by the bar association seemed automatically to spell the doom of the bill in the legislature. In order to cure this situation the bar association employed as a full time secretary a young lawyer who was a member of the Texas legislature. This young man, skilled in legislature procedure, has been a definite asset in bringing about cooperation between the Texas bar and the Texas legislature. The president of the Texas Bar Association has become the chief lobbyist before the legislature — a lobbyist for the interests of

JUNIOR BAR EXECUTIVES MEET AT NEW ORLEANS

the people and for the Texas bar, and a far larger proportion of bills sponsored by the bar are now being approved by the legislature.

In the general discussion that followed Mr. Simmons' report, Messrs. Morse, Luttrell, and Chairman Maguire reported generally successful cooperation between the bar and legislature in Mississippi, Oklahoma, and Florida respectively, while Mr. Quinn reported a refusal of the Arkansas legislature to cooperate with the Arkansas bar. Having secured bar integration by the initiative, however, Mr. Quinn felt that the need for legislative action in Arkansas was no longer so great as it had been.

Bar Rules

Chairman Maguire then called on Angus G. Wynne, President of the Texas Bar Association, for a discussion of the new rules of the State Bar of Texas. Mr. Wynne described the work of the new Bar Association rules committee in drafting the proposed rules for the Texas bar. After the rules were drafted they were published in the *State Bar Journal* so that all Texas lawyers could be informed of their content and enter objections. As a result of comments received the Committee reported the proposed rules to the Supreme Court and they were mailed out to the lawyers for ratification. Fifty-one per cent of the lawyers who vote must approve each rule before it becomes a rule of the Texas Bar. Mr. Wynne reported that a satisfactory vote was being cast and that the lawyers were really interested.

He also reported that there is presently functioning in Texas a Supreme Court committee to prepare new rules of civil procedure. More than twenty-five institutes have already been held under the auspices of the committee on the subject in various parts of the state. These institutes have been well attended and the proposed changes in the rules spiritedly discussed, after being explained by professors who have specialized in Texas Civil Procedure.

Usury

Chairman Maguire then called upon Park Street to relate the activities of the San Antonio, Texas, Bar Association in leading a crusade against loan sharks in that state. Mr. Street gave an interesting account of the activities and public service performed by the "anti-usury" committee under the chairmanship of Al. M. Heck of the San Antonio bar, in awakening the people to the evils of loan sharks and the necessity for regulations of usury interest. Copies of *The Subpoena*, a publication of the San Antonio Bar Association, were distributed, this issue being entirely devoted to the evils of loan shark business. Mr. Street said that Mr. Heck had written and produced more than one hundred radio programs on the evils of loan sharks, and that the committee had handled more than three thousand cases for poor people last year in this connection. Mr. Heck described the activities of his committee in filing suit to recover double usury charged and the need for legal aid generally to help the poor protect their legal rights. After a general discussion of the need for, and type of, small loan legislation, and the difficulties of getting legislation adopted in view of the powerful loan shark lobbies present in the legislature, Chairman Maguire called up the next subject for discussion.

American Law Institute

Judge Joseph C. Hutcheson, Jr., of the United States Circuit Court of Appeals, Fifth Circuit, spoke on cooperation between local and state bar associations and the American Law Institute, and suggested that the bar, in conjunction with university professors, could perform a real service in annotating the restatements of the American Law Institute to the local law of the states, and that this task had become increasingly important since the decision of the United States Supreme Court in *Erie R. R. v. Tompkins*.

Bar Integration

President Beardsley was then asked to give his view of bar integration. Mr. Beardsley stated that lawyers should start out with the premise that "we shall serve ourselves best by serving the public interest." Mr. Beardsley remarked that in his opinion admission to the practice constituted lawyers public officials and that the bar constitutes a department of the state government created to render service to the people of the state. Bar integration is simply a method of organizing the bar better for public service. Mr. Beardsley pointed out that the bar needs public respect and public trust, and that this is to be achieved by performing public service rather than by resenting the unkind and unjust things that are said about lawyers. He said that the public blames lawyers for court delays and injustices when in fact the laws are made by the legislature and the qualifications of lawyers are governed by courts, and that in order to defend themselves against these unjust criticisms lawyers must get the power to govern themselves and provide the public with what it demands. This can only be achieved through bar integration, which means a self-governing bar comprising all lawyers of the state. He further said that there are three methods of achieving an integrated bar: first, by an act of the legislature; second, by a rule of court; and third, by a combination of the two. Bar integration based upon legislation, he said, was the best method. The objections to integration by rule of court are two-fold. First, it is a serious danger to the judicial system because of the tendency to call more and more on judges to do more and more things, thus leading the judges out of judging and into fields of controversy and politics which can only have an unfavorable effect on the judiciary. With reference to the inherent power of the court to regulate the bar: "Judges must confine themselves to a diet of adherence and not a diet of inherence," Mr. Beardsley remarked. The second reason advanced was that the self-governing bar requires legislation no matter what you call it, as it is a new departure in bar technique. Judges are the essence of conservatism and it is extremely difficult to get judges to change things or to make advances. "Judges just stand still," commented Mr. Beardsley. In conclusion Mr. Beardsley stated that bar integration should be achieved by legislation creating a self-governing bar with powers over the qualifications of its members and authority to discipline lawyers for infractions of its rules.

Legal Institutes

The afternoon session was given over to three very interesting discussions: Legal Institutes, Unauthorized Practice and Bar Publicity.

The discussion on legal institutes was made by Burt J. Thompson of Forest City, Iowa, a member of the Section of Legal Education and Admissions to the Bar. Mr. Thompson pointed out that there are five times as many lawyers outside the American Bar Association as there are members, and that we do not have in the United States anything that can be called an organized bar. He insisted that if lawyers are going to render a service to the public then these public leaders must be organized. Mr. Thompson said that he would like to

have an integrated bar all over the United States, but as only about twenty states have such an integration, a substitute for it should be found, and that substitute is the legal institute. Mr. Thompson pointed out that the convention type of institute presupposes a large city, whereas the majority of lawyers live in cities of less than one hundred thousand population. Hence, Mr. Thompson concluded there is a definite need for smaller institutes serving these small localities. He recommended that judicial districts be organized by a committee which will set a date and place for the institute and send out invitations to all lawyers whether members of the American Bar Association or the State Association or not. Institutes of this sort should be carried on mainly by speakers brought from adjoining districts so as to reduce expenses. Mr. Thompson pointed out that some nineteen states have adopted this plan and that it has met with considerable success. The program should be designed to assist the lawyer in practicing law and to render instruction in new developments, decisions and statutes in the law. As an example of some of the subjects treated in such institutes, Mr. Thompson mentioned negligence, Probate Law, and a discussion on "How to Try a Law Suit." He suggested that at the end of every institute a summary, documented with authorities, be given to those in attendance.

Unauthorized Practice

Chairman Maguire then called up for discussion the unauthorized practice of the law and pointed out that lawyers should be interested in the question, not only because unauthorized practice steps on lawyers' toes, but because it best serves the interest of the public to restrict the practice of law to qualified practitioners. "The practice of law should be confined to people skilled in the law," commented Mr. Maguire. He pointed out that he personally made considerably more money when contracts for the purchase of land, for instance, were drawn up by real estate agents than when he drew the contracts himself. Lawyers may actually benefit in a pecuniary way from the unauthorized practice of law, but the interest of the public is not served by this practice.

Chairman Maguire then introduced Edwin M. Otterbourg of New York, Chairman of the American Bar Association Committee on the Unauthorized Practice of Law, who said that the American Bar Association is insisting upon a program through its Unauthorized Practice Committee by which the bar will be of greater service to the public. He pointed out that the bar is capable of the finest kind of service and advice to the public and that therefore the public is entitled to four things where legal matters are concerned: 1. Skill or competency; 2. Disinterestedness; 3. Loyalty; 4. Responsibility. These are services that a business cannot give and it is a task of the American Bar Association Committee on the Unauthorized Practice of Law to make the public understand what the lawyers seek to do for the public. Mr. Otterbourg emphasized that this is not a private fight over fees but a fight in the interest of the public to keep them from being deprived of the service outlined above. He explained that there are four points of argument that must be met with regard to unauthorized practice: First, that lawyers are untrustworthy; second, that services can be rendered cheaper by non-lawyers; third, that the objectionable practice is one that businesses have been doing for years, that it has become a custom for businesses to perform such service; fourth, that the service is very simple and requires no particular skill or competence. He pointed out that his committee was seeking to achieve results not so much through legislation and prosecution, but through education of laymen engaged in the unauthorized practice. In this way the committee has been able to do substantial constructive work. As an example he referred to the practice of life insurance agents who engage in rewriting wills and trust estates in setting up life insurance contracts. His committee protested these practices to the National Association of Life Underwriters and as a result of the discussion with them a joint meeting of the American Bar Association Committee on Professional Ethics and Committee on the Unauthorized Practice met with a committee of the National Association of Life Underwriters and came to an understanding as to the proper sphere of attorneys and insurance agents. A similar arrangement was made with the National Conference of Adjusters in the casualty field. Mr. Otterbourg said that there were two groups with which his committee was unable to make headway, the real estate brokers and certified public accountants. The real estate brokers insisted that the bar permit them to draw up contracts, deeds, mortgages and other documents in connection with real estate transactions. Mr. Otterbourg warned that they are going into the legislatures of all of the states of the union with proposals to amend all real estate brokers, licensing acts to give them the right to perform these functions and that they have already succeeded in Minnesota and a few other states. The accountants insist upon advising their clients as to their legal rights in the tax field. Mr. Otterbourg stated that litigation with the government frequently arises out of tax renditions, etc., and that clients should have the services of both lawyers and accountants with regard to these matters. He said that here again the accountants are going to the legislatures to give them the power to perform certain legal services. He emphasized that these lay groups have powerful national organizations and that it will be a bitter fight in the legislatures of the states, and offered the services of the American Bar Association's Committee on Unauthorized Practice in helping local bar associations combat these inroads in the state legislatures.

Junior Bar Conference

The final discussion of the afternoon program was made by Paul Hannah, of Washington, D. C., Chairman of the Junior Bar Conference of the American Bar Association. This discussion concerned public relations of the bar. Mr. Hannah stated that the public must understand that the bar appreciates its responsibility. To this end Mr. Hannah reported that the Junior Bar is conducting an experiment by giving public information programs through the radio, the schools, clubs, etc., where speeches on American citizenship, the Bill of Rights, juvenile crime prevention, etc., are given. Mr. Hannah observed that by going to the public and performing these functions, asking for nothing in return, public confidence will be gained so that when the bar does ask for public support they will not be suspicious of ulterior motives. Mr. Hannah reported that a series of thirteen radio scripts were being prepared on various topics to be lent for use by local associations, and that they plan to organize a great deal of speech material to be available for use. Mr. Hannah requested the cooperation of local bar associations in forming and developing this program.

Woman and the Law

Changes in Ideas of Woman's Status

FOR a good many years Americans have lived happily and complacently, paying little attention to anything outside of their immediate orbit. Their point of view towards certain matters was changed unconsciously however and they now look back with amusement at some of the ideas current in a previous generation. The hilarity and appreciation which everywhere greeted the play "Life with Father" is a case in point. Everyone seeing it undoubtedly recognized his own mother and father, and, while acknowledging their charm, felt their ideas and actions slightly ridiculous.

One of the ideas that has changed radically is that towards the status of women, both legal and otherwise. When the constitution of the United States was written, its authors seemed to accept the idea (if they thought about it at all) that women needed the protection of their husbands rather than that of the law. None thought of giving them any civil or political rights, and, as far as I know, no woman but Abigail Adams thought of asking for them. The same attitude continued to prevail even after women had proved their mettle in the pioneering days of the great movement westward. However, as the country grew larger and life became more complicated a few women saw the need for a change in their status and risked social ostracism by demanding recognition.

Public Opinion Controls

In a democratic country, public opinion can eventually be aroused over most matters that have real merit, if those interested persist long enough. Women have gradually proved that they have valuable contributions to make to their country in addition to (not instead of) their time honored service in the home, and slowly but surely many of the restrictions standing in the way of their complete development are being removed. The tendency, however, is to limit the removal of such discriminations in order to protect certain needs inherent in woman's nature, by the passage of such bills as the eight-hour law.

Today American women enjoy complete political rights in every state except Wisconsin and Oklahoma, the former state forbidding a woman from running for governor, and the latter state forbidding her to hold any major office. In all other states women may be elected or appointed to all public and party offices. No longer do they lose their citizenship by marriage to an alien. In most states civil service laws contain no discrimination because of sex. Most states now have support and homestead as well as property right laws. Laws protecting them in industry are also very common—women are admitted to educational institutions and to the professions in most places on the same terms as men. The "Old Maid" of a generation ago who was dependent on her family's bounty, is a forgotten memory. Today women, both married or otherwise, are able to make real contributions to the life of the United States.

The Other Side of the Picture

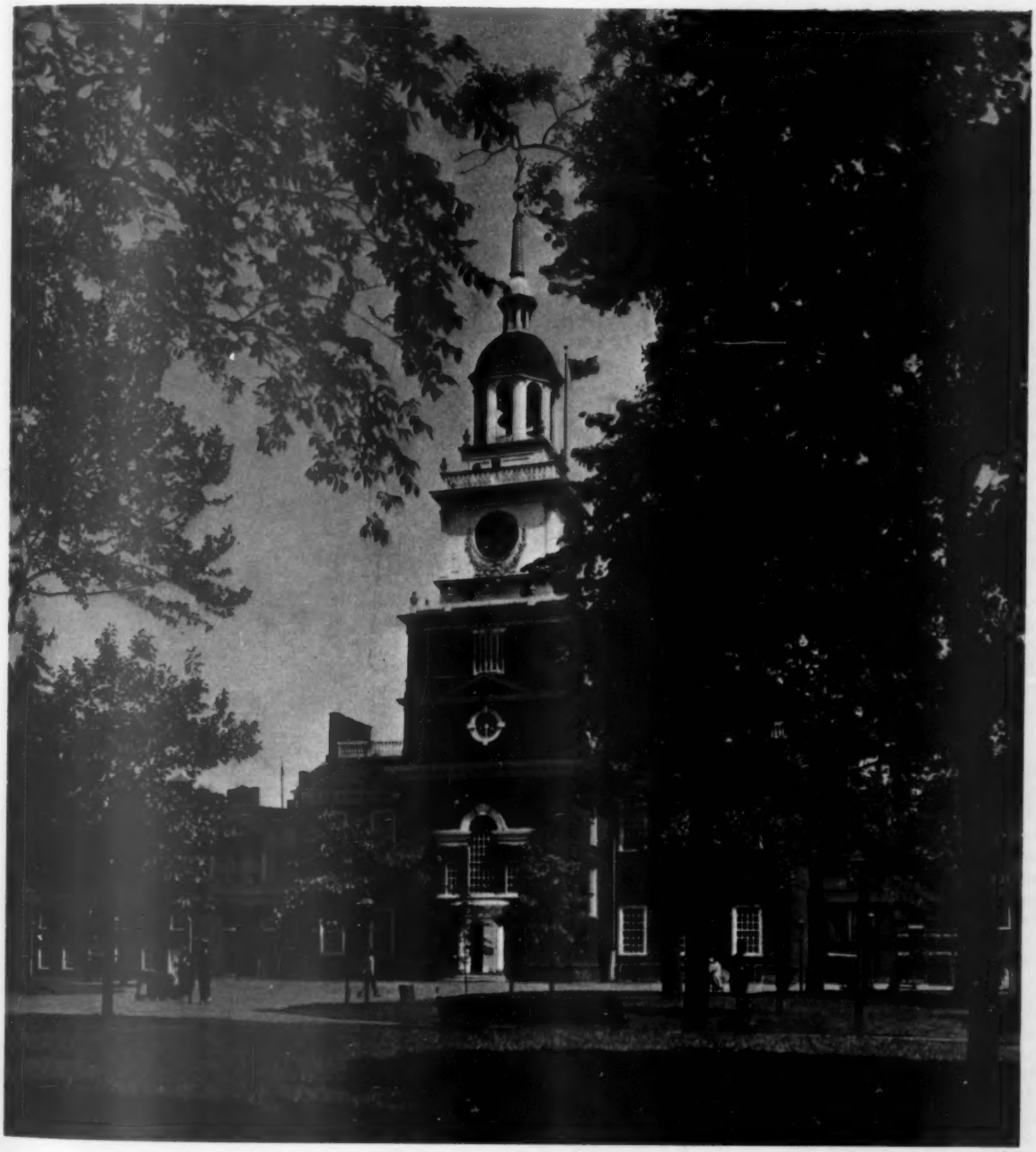
I have pointed out the bright spots in the picture so far, however. There are shadows also, and it is time that they be examined thoughtfully. In certain states there still remain discriminations reminiscent of the middle ages. One state permits the father to will his child without the consent of its mother. One or two others forbid a wife to have any legal share of the family income or any voice in the choice of domicile. No state provides a legal share in the family savings account. Other discriminations could be mentioned which are so incredible that they seem like Ripley's "Believe it or not." Progress in their removal was progressing fairly well until about 1932. The passage of section 213 of the National Economy Act discriminated against married women in the Federal Civil Service. This was the opening attack against the employment of married women, and was followed by the introduction, and sometimes the passage, of many similar state laws. Sometimes the refusal to employ married women, while not recognized legally, persisted because of the feeling that they were holding jobs needed by men. This tendency became quite widespread in spite of the fact that it was proved that very few of them held jobs which men, could or would take, and that most of them were working really because they had someone dependent on them for support.

Discrimination and Prejudice

There is another kind of discrimination however, which seems to be more widespread than is generally realized. This is the discrimination which comes from prejudice against a woman—and it comes from both men and women alike. Women doctors and lawyers, no matter how well equipped, have a hard row to hoe. Practically no man and few women will hire them. What business they do have, pays less proportionately. Women in industry also often receive less wages than men for the same work equally well done. Women in politics are there on sufferance in most places. Few of them have important party positions, and relatively few hold public office. Those that do, while apparently admired by many of their own sex, are in reality often looked at somewhat askance. I speak from experience. Every time there is an election in Chicago (and elections there are always exciting) I am invited to address countless groups of good people (men and women) to tell them something about the election. They think it is wonderful that I, a woman, know "so much" about politics, but I notice that none of them "go out and do likewise."

The darkest shadows in the picture are those of prejudice and indifference, and they can now be overcome by those who have courage, persistence and ability enough to become outstanding in their fields. When enough do this, the rest of the legal discriminations will be easier to remove, and prejudice will gradually disappear, so that women will be judged on their real merits.

L. T. S.



Independence Hall, Philadelphia, Where the Declaration of Independence Was Adopted and the United States Constitution Framed. The United States Supreme Court Sat Here and District and Circuit Courts of the United States Also Were Held.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

English Parliament and American Congress

Parliament, by W. Ivor Jennings. 1940. New York: Macmillan; and Cambridge, England: at the University Press. Pp. xiii, 548.—The literature of legislation is enriched by this new description of the English Parliament. It brings up to date the work of May, Redlich, and Ilbert. The last generation has seen important change with which any student of the subject should be acquainted, and here it is competently set forth.

Naturally the American reader will be most interested in the contrasts he may make between the methods of the mother of Parliaments and those of her oldest child, the Congress of the United States. He will find few resemblances, many differences. The resemblances are mainly in matters of form and are comparatively unessential. The differences are those of the spirit and go to the essence.

The purpose of Parliament is to enact the laws that commend themselves to the small group of statesmen called the Government. As long as their proposals win the approval of a majority of the House of Commons, the Government stays in power. When defeated in any matter of importance, it resigns and goes to the people for judgment in an election.

The result is that the Cabinet Ministers take the initiative and, while their power lasts, control. To that end is framed the whole body of rules and practices in describing which the author is meticulous, and for an American reader not greatly interesting. He does, however, find out why a seat in Parliament is far less attractive than that of a member of Congress, who, whatever his politics, has the chance to play a real part in law-making and to feel that, if he wishes, his membership in Congress is not wholly in vain.

Private Members Have More Scope Here

This comes about because in Congress any member may introduce a bill with a reasonable chance for consideration. It goes to a committee as matter of course, and if its idea is approved by the committee it eventually gets on a calendar for action by House or Senate. It has no special status because it has been approved by the Administration or even when it is known or surmised to have been suggested by the Administration. This does not mean that it does not have to surmount many obstacles in its course to the White House for Presidential signature. It does mean that the proposal has equal chance whatever its origin, as far as rules and practices go.

In Parliament, on the contrary, a private member cannot even get his bill considered unless he is lucky enough to draw a high place in what there is called a "ballot" and that we should call a "lottery." Even then he must be fortunate enough to be one of those who can get a part of the scanty time available and his proposal must not be objectionable to the Government.

No State Legislatures in England to Share Work

This has come to pass through no deliberate attempt to monopolize the work of law making by the party at the moment in power. Chiefly it has resulted from England's having no State Legislatures like ours, to handle matters of minor consequence or local concern. In England private bills are defined as those "for the particular interest or benefit of any person or persons." In England proposals of this sort reach Parliament much oftener than here they reach Congress. Yet with us they are too plentiful and one of the pressing problems we have is how to lessen the number that vex Congress.

Indeed this problem of how to handle administrative legislation, the rules and orders necesary to give effect to broad principles and purposes, appears to be no less urgent in Parliament than in Congress. Eventually it will probably have to be recognized that Administration is a fourth branch of government and be organized accordingly.

Use of Standing Committees

We have gone far beyond Parliament in taking out of legislative chambers, State and national, the great bulk of preliminary work, now done with us by small standing committees. The English development has been by way of what Mr. Lloyd George called "miniature Parliaments." Beginning with what was no more than experiment in 1882, it took important shape wth the reforms of 1907, when provision was made for a committee to consider public bills, and four other committees without specified fields of action. These have from 30 to 50 members, which may be enlarged to 80, or diminished by leaving vacancies unfilled.

The all-important difference between this and our way concerns jurisdiction. Congress and the Legislatures have small specialized committees, each working in a defined and restricted field. Under the American system committee members acquire all the virtues of specialists, even though with some of their defects, such as ignorance of and lack of interest in other problems.

One result with us is that nine-tenths of the real work of law-making is done in the committee rooms. This it is that lets Congress escape turning over the details of law-writing to the administrative departments. This it is that compels Parliament to confine itself for the most part to what is in effect a veto of Cabinet decision, a veto that if important will result in a judgment by the electorate given in a general election.

Handling Minor Legislation: Provisional Orders

In England, as here, the pressing problem is that of wisely handling the great and ever-increasing volume

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of what may be called minor legislation. We think our system of small specialized committees better than that of Parliament. On the other hand, Parliament may have excelled us with what are known as Provisional Orders, which are made by the various administrative departments and take effect unless they are disapproved by Parliament or when they have been approved. Study of them would be worth our while.

ROBERT LUCE.

House of Representatives, Washington, D. C.

Law, the State, and the International Community, by James Brown Scott. 1939. New York: Columbia University Press. Vol. I, pp. xxiv, 613; vol. II, pp. vi, 401.

Some are found to deny that International Law is law at all. Others think it the private preserve of the select circle of nations comprised in modern Europe and America. But, as Carlyle says, what can be done anywhere without law? Dr. Scott recognizes that the essential unity of law is bound up with the essential unity of mankind. In the first of these two handsome volumes he traces its development from the days of classic Greece as far as the Spanish Catholic jurists and Richard Hooker, giving a fairly-knit and coherent account of the gruesome ways in which the ideas which underlie it have been formulated up to the opening years of the seventeenth century, which Dr. Scott chooses as his modern limit. In the second volume, he lets his authorities speak for themselves. Like Justinian, he selects a series of texts which summarize and illustrate in tabloid form the essence of their opinions. This is not done chronologically, but under minutely classified heads—thus, under *Possession of Property*, we get St. Augustine rubbing shoulders with Justinian and Victoria. Cicero, St. Thomas, Suarez, Victoria, Bellarmine, Ayala, Gentili, St. Isidore and Hooker constitute the bulk of the apparatus. Machiavelli and Bodin are deliberately excluded, as backwaters. Excerpts divorced from their context are never wholly satisfactory, and the reader need hardly be cautioned against treating this second volume as a systematic exposition. This, it should at once be said, is not Dr. Scott's view. He regards the volume as a codification of the fundamentals of political science and jurisprudence, and considers his own work (embodied in the first volume) a mere commentary upon it: a modest view in which we can scarcely follow him. We regard his own exhibition as of the highest intrinsic value.

Supremacy of Force Denied

He begins by denying the supremacy of force and expediency. "It is only because of the so-called 'enlightenment' of the modern world that an effort has been made to separate law from religion and morality and place it . . . where it may not be 'tainted' by the spiritual standards and aspirations of men. The result is that law and politics have been too long without a standard, and that law, government and international relations are founded upon expediency instead of upon the bedrock of principle." He goes on to show that the nature of mankind dictates imperative rules of intercourse which have been recognized throughout the course of history as right reason, and elaborately develops this noble theme, skillfully avoiding the pitfall of confounding law with morality,—but with a somewhat uncritical acceptance of the doctrines of Parliamentary liberalism. We are not sure, by the way, that Doctors' Commons "sat in Gray's Inn" and included canonists, or that the English University Courts are in the habit of administering Roman law. It is pleasant that Dr. Scott appreciates the merits of Lorimer of Edinburgh—"the most philosophical of British jurists."

TH. BATY.

Foreign Office,
Tokyo, Japan.

Prologue to Politics, by Charles E. Merriam. 1940. The University of Chicago Press. pp. 118.—Prof. Merriam, who is a scholar and scientist but also a former Chicago alderman and a member of various research commissions and governmental agencies, has written this little book—whose four chapters were originally university lectures—not for the purpose of answering certain questions in political science, but rather to raise and suggest questions, and to stimulate critical thinking. His "prologue" is ultra-modern, not to say radical. It could not have been written twenty-five years ago.

The discussion is, of course, sober and judicious, and its tone is quiet. But it is plainly the result of much dramatic and stirring experience. The whole post-war world is reflected therein. Many issues scarcely suspected by the average legislator or statesman are touched upon, and hints of coming changes in government and social-economic policies are thrown out.

The headings of the chapters indicate the scope of the little book: The organization of violence; the organization of consent; the ideal state; the tasks of politics. Prof. Merriam is no Utopian, and he indulges in no purely academic theorizing. He is always close to reality. When he defends administrative agencies and opposes excessive "judicial review," he knows whereof he

speaks. When he recognizes the necessity of "planning" by governments, he does not lose sight of the dangers of bureaucracy or of spoils. He expects important developments, and is on the whole optimistic, despite present reactionary trends and the march of tyranny and obscurantism. The future belongs to reason, justice and democracy, not to brute force. Privilege is dying hard, but it is dying. Old dogmas are being gradually superseded by conceptions born of new social conditions. Elections, party organization, legislatures, forms of public control, industrial relations, property rights are severally undergoing readjustments, and it is our business to understand and facilitate the pending and emerging changes.

Some one should provide all the members of Congress with copies of this unique Prologue to Politics. It is distinctly "subversive" but at the same time rigorously scientific and tonic.

Public Policy. (A yearbook of the Graduate School of Public Administration, Harvard University). Edited by C. J. Friedrich and Edward S. Mason. 1940. Cambridge, Mass.: Harvard University Press. pp. 390.—This is the first of a series of annual volumes that will offer the educated lay public, civil servants, and political leaders scholarly papers on, or studies of, "narrow segments of public policy." The contributors will be either members of the faculty or public officials who have been Fellows of the school. The design is to combine the experience of the practical administrator with the detachment of the teacher and educator. Naturally, partisanship is to be avoided, and dogmatism and polemics as well.

Each volume is to have a general theme. The present one deals with the broad, timely subject of industrial organization and control, but some of the essays are merely related to this central problem. It is not difficult to perceive that all the contributors are moderately progressive in their political philosophy and anxious to preserve "liberal democracy." All realize the great complexity of the political and economic changes that have taken place, or are about to take place, and they raise more questions perhaps than they answer. For example, regulation of public utilities and other industries is inevitable, but what are the effects of regulation? Does it make for timidity in management and hence for lack of initiative and efficiency?

In the discussion of monopoly vs. competition, the ideas and methods of Thurman W. Arnold, chief trust-buster, to which union labor is objecting so strenuously, and which gets little commendation from business, are appraised with due appreciation of their reasonableness and fairness. The issue of administrative discretion and the proper limits of judicial review is admirably presented by Prof. Friedrich, one of the editors. Another judicious and thoughtful study is that on constitutional dictatorship, ancient and modern, direct and indirect, including delegation of legislative power. The lessons of Britain's handling of the budget are pointed out by George Jaszi.

In short, the whole volume not only supplies valuable information, but exemplifies the sincere use of the scientific method in canvassing important questions of public policy at a critical juncture. Candidates for high office would do well to ponder and profit by the example here set.

VICTOR S. YARROS.

Chicago.

PROF. CHARLES E. MERRIAM

Studies in the Adequacy of the Constitution, by James Barclay Smith. 1939. Los Angeles: Parker & Baird Company. Pp. xv, 366.—Under this title the author has brought together, with the addition of two new chapters, the substance of a number of articles which he has written for various law journals. His aim is to show that the powers of the states under the Constitution are adequate, through the exercise of their police powers, to meet their social needs, and that the powers of Congress are likewise adequate to meet the needs of the nation. To this end he examines the right of the Government to engage in activities that are competitive with private business, the right of Congress to use its taxing powers in furtherance of social objectives, the limitations upon the states in the exercise of their police powers, including price control and rate regulation, and the far-reaching powers of Congress under the commerce clause both in the way of regulation and of prohibition. His conclusion is that both state and federal powers are adequate.

There is a chapter upon the vexed question of the exercise of judicial functions by administrative boards and commissions, and one upon the problems commonly grouped under the title of Conflict of Laws. As to the former he holds that review by the courts, under the test of due process, sufficiently protects all individual rights, and as to the latter that there are no problems at all, so far as conflicts under the varying laws of the several states are concerned. He would solve them all by the application of the full faith and credit clause in the light of the decisions of the Supreme Court.

The troublesome question of child labor the author would have Congress deal with through its taxing powers, notwithstanding the hard luck which has heretofore

(*Continued on next page*)

Scott on Trusts: A Review

by C. H. H. Waldock, Brasenose College, Oxford, England

THE Law of Trusts, by Austin Wakeman Scott. In four volumes. 1939. Boston: Little, Brown & Co. Pp. Vol. I, xlv, 816; Vol. II, xvi, 817-1727; Vol. III, xvi, 1729-2604; Vol. IV, table of cases and index, 2605-2981.

Professor Scott, as is well known, was Reporter for the Restatement of the Law of Trusts. Here we have from his hand a three-volume treatise on the same subject and he seems himself to have thought that another work of this magnitude required explanation. Therefore, in his preface he reminds us that the character of the Restatement as an authoritative digest of law administered in diverse jurisdictions made the citation of cases impracticable and the discussion of controversial issues undesirable. He then states that his present object is firstly to present more fully the reasons which justify the rules promulgated by the Institute and secondly to indicate the authorities upon which those rules are based. Readers of the Restatement will fully endorse the decision to publish a more critical account of the law of trusts than it could provide. To be plain, the doctrinaire statement of principles essential to a digest or code renders the Restatement an unattractive study; nor is it much relieved by the desiccated cases which are included by way of illustration. The contribution of the various Restatements to Anglo-American jurisprudence will no doubt be considerable, but their aim is legislation rather than education. They do not pretend to be nor are they a substitute for text-books. The qualifications of a Reporter to write a text-book are obvious since his very office has compelled him to supplement his own learning by using too the brains of his eminent colleagues. His debt to the other members of the committee is most freely acknowledged by Professor Scott and it is, indeed, a sufficient argument for the publication of his treatise that it gives us some knowledge of the debates out of which came the careful pronouncements of the Restatement.

Relation to the Restatement

A strong connection exists, therefore, between these volumes and the Restatement, and in fact their general plan closely follows that of the latter. Moreover, to facilitate cross-reference, their chapters are divided into sections whose numbers correspond with those found in the Restatement. The difficulty of maintaining this correspondence despite the expanded material is obviated by a system of decimal subsections. But it must on no account be imagined—as perhaps it might be from a casual reading of the preface—that this new treatise is merely an annotated and swollen re-publication of the Restatement. Nor is it a mere commentary. Naturally, the views expressed by Scott on Trusts are largely identical with those sponsored by Scott the Reporter, but they are here presented quite differently. There must be no mistake: this is essentially a new work.

A treatise of this bulk—there are some 2605 pages

(*Continued from previous page*)

attended its efforts in that direction. He argues against the adoption of a child labor amendment on the plausible ground that the fundamental law should not be amended in the teeth of widespread opposition, even though by only a minority. He would have Congress amend the Social Security Act by introducing a new category for special taxation, namely the employers of children under the age of sixteen.

There is abundant citation of pertinent Supreme Court decisions, and frequent quotation from the text of opinions. The author has a formidable vocabulary. He tells us, for example, that the argument that the judges ought to respond to the will of the people "labors under a strange catachresis," and that service for use as a factor in the determination of a rate base suffers "from a hereditary ichthyosis." As to controversies over the Conflict of Laws among those versed in the subject he points out that "within the cult promiscuous endogamy has caused the descending theories to suffer from hereditary atavism." Sentences such as these one must do with what one can.

ARTHUR M. BROWN.

Boston, Massachusetts.

The Machinery of Justice in England, by R. M. Jackson. 1939. Cambridge: University Press. 342 pages. This little book contains the simplest and most intelligent description of the English judicial system that has yet been written, at least from the point of view of the American lawyer. The book is apparently prepared primarily for English law students, to be read by them during their first year of law study. Thus it is fairly well suited also to the average American lawyer, whose prior knowledge of English law and the English system of courts is about equal to that of the English students for whom the book is written.

After a brief historical introduction, Mr. Jackson describes in broad outline the courts which try different types of civil cases, and then those which try criminal cases, and the procedure before them, both in first instance and on appeal. His description includes the manner of handling such matters as arbitration in civil cases, and juvenile offenders and probation on the criminal side—matters typical of many which, despite their practical importance, are too often deemed to fall "outside the law." His chapter on "The Personnel of the Law" explains the division of labor between solicitors and barristers, the system of English legal education, and the relative functions of judges and juries in English courts. There is a very illuminating chapter on "The Cost of the Law" which indicates that the processes of justice are even more inaccessible to the impoverished litigant in England than in America, and that no more is done about it there than here. The final chapters on "Special Tribunals" (including administrative bodies) and "The Outlook for Reform" read like the writings of public-spirited American lawyers who realize that the present legal system is imperfect and who are trying to figure out what should be done about it.

An intelligently critical work, such as this, is a welcome relief from the unmitigated praise of all things English that has recently been popular among American lawyers (and among some English lawyers too.) From it, one sees the English legal system as a physically functioning thing, rather than an ideal which has risen above mundane error. One gathers now that even English judges are human, and that there are still Englishmen who worry about the modern equivalent of the legal inadequacies which moved men like Dickens and Bentham to vivid speech in an earlier day. No such vivid speech is in this book, but simple descriptive honesty there seems to be.

ROBERT A. LEFLAR.

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of text alone—is of course intended to be nearly exhaustive. In such a work the danger of infinite expansion must always be considerable and this is especially so when the subject is so vigorous and flexible an institution as the trust. Professor Scott has avoided this danger by refusing to be led into a discussion of specialized types of trust save in so far as they illustrate more general principles. Thus charitable trusts receive full consideration but no special place is found for "security" or for "business" trusts. Actually the treatise is longer by nearly 300 pages owing to the inclusion of constructive trusts which the Restatement places not under Trusts but under Restitution. Scientifically that arrangement is of course more correct since it is now accepted that the constructive trust is a remedial device, an equitable form of action, rather than a true trust. Nevertheless constructive trusts are so important in making effective the relief given to beneficiaries under express trusts that some mention of them was inevitable. English lawyers, at any rate, will not regret that their treatment here is fuller than the law of express trusts demands, for no tolerable account of constructive trusts has come from an English publishing house. But the inclusion of constructive trusts did create a difficulty in the numbering of the sections since correspondence with the Restatement of Restitution would have involved breaking into a different series. Cross reference to the Restatement would, we think, have been worth preserving, but elegance has prevailed and the notation of the sections in the treatise is continued uninterrupted.

Use of Decided Cases

Our duty as reviewer is perhaps already discharged with this brief account of Professor Scott's treatise, for his name is a guarantee of the workmanship, and an English academic lawyer has not the impertinence to advise American practitioners in choosing the tools of their trade. He cannot, for example, judge whether in the citation of cases the right balance has been struck between economy and prolixity; for the selection of authorities presents such a different problem when they are to be drawn from numerous jurisdictions. At any rate, it can be said confidently that this treatise is not overburdened with cases; it may even be suspected that English practitioners would have hoped for more complete citations. But we ourselves believe that Professor Scott has achieved a mean which ensures practical utility without sacrificing the high qualities of the treatise as a work of jurisprudence.[1] It is because these volumes may well claim to be the most important account of the jurisprudence of trusts now available in America or England that we venture some further comments.

Definitions and Distinctions

An instructive first chapter expands the definitions and distinctions found in the Restatement. Our only doubt is that the process of differentiating the trust from analogous institutions may be carried out so forcefully that the similarities are forgotten. For example, the distinction between trusts and mortgages admittedly requires every emphasis since the fallacy that a mortgagee is a trustee is still repeated.[2] At the same time the resemblances are noteworthy. It is not only that a mortgagee holds a title in which the mortgagor has

1. The table of cases runs to nearly 200 pages of Volume IV, each page having a double column: at a rough estimate there are about 12,500 cases in the table.
2. A recent instance can be seen in *Allen v. O'Hearn & Co.* [1937] A. C. 213, 217.

PROF. AUSTIN W. SCOTT

in equity the beneficial interest, but also that historically the conception of equitable estates was developed in the equity of redemption *pari passu* with the trust interest. The superficial resemblance is of course closest when a trustee is also one of the beneficiaries. The gist of the distinction is that a mortgagee's interest is essentially adverse to that of his mortgagor, while that is never so between trustee and cestui que trust. In consequence, equity refuses to control a mortgagee's use of his legal rights until his adverse interest has been satisfied. Professor Scott indicates most of the substantive points of difference, but he should—we feel—have added that a satisfied mortgagee does indeed become a trustee. The difference between trust and breach of contract is stated succinctly and English law is justly placed in the dock. Attention might perhaps have been drawn to the fact that the Law Revision Committee has made a recommendation designed to give contract rights to third-party beneficiaries in line with the decisions in the United States.[3] Professor Scott further stresses the difficulty of determining in these cases whether there is an intention to create a trust interest or a contract right and he criticises severely the reasoning in *Bank of America National Trust v. Hazelbud.*[4] Familiar English cases are cited, but what is now perhaps the leading case, *Vandepitte v. Preferred Accident Ins. Co. of New York,*[5] is surprisingly omitted.

Evidence to Prove a Trust

The difficult subject of the evidence required to prove a trust is very well handled. Following Ames,[6] Professor Scott maintains that proof of an oral trust of

(*Continued on page* 542)

3. Sixth Interim Report, pp. 25-30.
4. 21 Cal. App. (2d) 109.
5. [1933] A. C. 70.
6. *Lectures on Legal History,* 412 *et seq.*

(*Continued from page* 540)

land can be permitted without departing even from the letter of the Statute of Frauds, if its relevance is confined to the prevention of unjust enrichment. But in the case of wills he does not agree with the opinion of Ames that to enforce an informal trust according to its terms infringes the Statute of Frauds but not the Statute of Wills. His own view that such a trust is avoided also by the Wills Act is rational enough, but we are not convinced that the more technical argument of Ames is not the correct one. As long as the trusts are accepted before the testator's death, the only effect of the will is as the conveyance to pass the title to persons who have already undertaken the office of trustee. It was by this reasoning that Lord Sumner justified the decision in *Blackwell v. Blackwell*,[7] though not all of his statements in that case are entirely satisfactory. Professor Scott, therefore, contends that the court ought never to go further than to restore the property to the settlor or testator, but of course he points out that in the case of wills the weight of authority is in favor of giving full effect to the trust. He concludes by defending the policy of the two statutes, by criticising vigorously the attitude of the courts towards them and by observing that legislatures have shown no tendency to do away with the formalities required by the statutes. But might it not be urged that it is their 'liberal' interpretation in equity which has made the statutes tolerable? It is true that in England the consolidating statutes of 1925 re-enacted the provisions of the Statute of Frauds relating to land, but the legislature, so far from insisting upon a strict interpretation, has preserved equitable doctrines.[8]

Following of Trust Property

Professor Scott examines his material with such meticulous care and maintains such a consistently high standard that it is difficult to single out one part more than another. Perhaps we found especially interesting his chapter on the liability of third persons and in constructive trusts his sections on the following of trust property. In the latter he rightly condemns the use of fictions to justify the perfectly logical doctrines of equity which are expounded in *Re Hallett's Estate*.[9] The mistake is sometimes made of supposing that the presumption of a trustee's innocence is the juristic basis of the rules by which title may be traced to a mixed mass of property, whereas it is no more than a picturesque way of describing the operation in this sphere of the maxim *nemo suam turpitudinem allegans audiendus*. Both at law[10] and in equity[11] the court does presume that, if one man mixes another's property with his own, the resulting mass belongs to that other; it is therefore for the wrongdoer to prove affirmatively that any part of that mass is in fact his own. This of course he can do by showing that the total mass exceeds the known quantity of the other man's property. But, if afterwards that total is diminished by his acts, he equally cannot make out his title to any part of the residue by alleging that his further acts were done with a fraudulent intent. The decision in *Re Hallett's Estate* itself is of great practical importance but it did little more than extend these principles to the tracing of title to a chose in action due from a banker. We are also in entire agreement with the argument that the rule in *Clayton's Case*,[12] having been formulated for the purpose of allocating the liabilities of partners, ought to have no place in the doctrines of tracing title. Unfortunately in England it appears to be settled that the rule of appropriating first withdrawals to first entries does determine the rights of competing claimants to the balance in a bank account.[13]

7. [1929] A. C. 318, 337.
8. See Law of Property Act 1925, § 40; cf. also *Blackwell v. Blackwell* [1929] A. C. 318, 338, per Lord Sumner.
9. [1880] 13 Ch. D. 696.
10. *Buckley v. Gross* (1863) 3 B. & S. 566, 574.
11. *Lupton v. White* (1808) 15 Ves. 432.

HARRY S. KNIGHT

of the Sunbury, Pennsylvania, Bar
Secretary, American Bar Association

Language of Treatise Praised

A treatise of this kind is, of course, much less useful without a very detailed index. Realising this, the publishers have provided a fourth volume containing 176 pages of index and a table of cases. All that can be said is that these have answered fully the demands that we have made upon them. Finally, we cannot conclude this inadequate commentary on a notable addition to the study of Anglo-American law without confessing our admiration for the lucid style in which it is written. Few writers on law today use such simple language as Professor Scott or have so great a power of exposition.

12. (1816) 1 Mer. 572.
13. *Roscoe v. Winder* [1915] 1 Ch. 62.

Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

Subjective Judicial Review of the Federal Communications Commission, by Harry P. Warner, in 38 Michigan Law Rev. 632. (March, 1940.)

The title of this long paper of forty-nine pages does not appear to be very informative. It is a comprehensive review of the communications commission, its history and its work. It differs from the usual law review article in that it is critical of some of the commission's work and apparently glad of the way the circuit court of appeals has "cracked down" on the commission. Contrary to the history of other administrative organizations the commission started with the confidence of this reviewing court only to lose that confidence to a very considerable extent. Accordingly, there was a period of restricted judicial review, 1927-1937. The changed attitude of a broader judicial supervision since 1937 is attributed to (1) lack of thoroughness by the commission, (2) a barrage of criticism that contributed to a lack of public confidence, and (3) an almost complete change of personnel in the Circuit Court of Appeals for the District of Columbia since 1937. "Perhaps this new judicial attitude may be attributed in part to the rapid change in personnel" of the commission. The recent Pottsville opinion by the Supreme Court of the United States is apparently viewed with some fear. Its effect "may well be to nullify the lower court's efforts to compel the commission to enunciate definitive standards. . . ."

ADMINISTRATIVE LAW

Symposium: American Bar Association's Administrative Law Bill, in 34 Illinois Law Rev. 641-743 (Feb., 1940).

Strange as it may seem, a law teacher, J. Forrester Davison, is sympathetic toward sections 2 and 3 of the bill, dealing with rule making and the judicial review thereof. An admirably objective attitude is maintained and the difficulties are frankly stated and discussed. No definite opinion of the desirability of these two sections, as drafted, seems to be stated but many will join in this mild reprimand: "In this case it is the reform agencies which are to be reformed, and their cries are the classic ones of the legal profession: new rules not well thought out; uncertainty for the lawyers; more business for the courts; longer delays in the doings of justice; more work for all concerned."

Professor Breck P. McAllister considers sections 4 and 5 of the proposed bill. His style is entertaining. But after selecting the Federal Security Agency, the Railroad Retirement Board, and the Veteran's Administration he considers what would happen if section 4 of the bill should become a law. The conclusion is that the section is "hit or miss" legislation and that it does not appear that all administrative organizations can be "compressed into two neat categories: i. e. "agencies" and "independent agencies." But complaint is made of section 5 that it preserves present diverse methods of judicial review and adds another that is substantially the same as the review provided in some seventeen existing statutes. The desire is for one uniform scheme for nearly all agencies. Finally, the A. B. A. is commended for administering "a kick in the pants" to the administrative establishment. Then the Association gets its kick. The bill is consigned to the scrapbasket.

ADMINISTRATIVE LAW

The Administrative Law Bill: Unsound and Unworkable, by Alfred Jaretzki, Jr., in 2 Louisiana Law Rev. 294 (Jan., 1940).

"Fatally defective," "poorly drafted," "*a priori* approach," and "fantastic in its application to many of the situations which are embraced." Such is the sweeping indictment except for a few nods of approvals here and there. A fairly detailed discussion of the provisions of the bill is not exciting. Such a discussion is rarely so. But proponents of the bill will do well, it would seem, to accept many of the criticisms as valuable, and profit by them. However, such an acceptance probably will not make a convert of the author. It is doubtful whether he thinks that the existing federal agencies are much in need of reform. In any event, he seems to be opposed to anything more than a reconsideration and possible reform of each agency by itself.

CRIMINAL LAW

Criminal Attempt—A Study of Foundations of Criminal Liability, by Jerome Hall, in 49 Yale Law J. 789. (March, 1940.)

The subject of criminal attempts has enticed another professor who ranges exhaustively over its history and philosophy. The result is an erudite article that will likely appeal only to those lawyers with distinctly scholarly tastes. Perhaps at long last the problem of attempts has been solved but, if so, the solution is not immediately obvious.

CRIMINAL PROCEDURE

Some Object Lessons on Publicity in Criminal Trials, by Oscar Hallam, in 24 Minnesota Law Rev. 453 (Mar., 1940).

The Hauptmann case is mainly relied upon to show the evils of the wrong sort of publicity. The report of a committee of the Section of Criminal Law of A. B. A. on this case is printed as an appendix. In addition, there are brief discussions of less notorious cases elsewhere in the United States. Much has been done through tactful cooperation with publicity organizations upon occasions, but no permanent program seems to have been agreed upon. Walter Lippman and the Bar Association report do not appear to be in disagreement. He thinks that the English courts have properly regarded it as contempt of court for newspapers and speakers over the radio to comment on the evidence during the progress of the trial. In general he is against the methods of the yellow press. Contrast R. R. McCormick of the *Chicago Tribune* who thinks that the English judicial system is a medieval institution; that the English courts have gagged the press; that the camera in court will become as common as the shorthand reporter; and that telling what transpired will not interfere with a fair trial. Well, taste is taste; read the record of what has transpired in U. S. A. and then make your choice between the Hauptmann trial in New Jersey, where the art of publicity had its full flowering even though an able judge tried to restrain it, and the way the trial would have been conducted in a "medieval" English court.

EVIDENCE

The Role of Hearsay In a Rational Scheme of Evidence, by George F. James, in 34 Illinois Law Rev. 788. (March, 1940.)

What is the present role of hearsay? It is "a principle of hearsay exclusion uncertain in scope and subject to fourteen (according to Wigmore) arbitrary and ill-defined exceptions, seldom well understood by advocate or judge." There are only four possible grounds for excluding relevant proof: (1) where the probative force is too slight to justify the time and expense; (2) where it would do more harm than good because of a tendency to prejudice or confuse; (3) where, if false, the opposite party could not be prepared to meet and rebut it; and (4) where it is inferior in quality to better evidence that could have been produced. What, then, should be the role of hearsay in a rational scheme of evidence? Hearsay should not always be admitted. "Where it is virtually of no value and merely consumes time, where it raises unduly long and difficult collateral issues, where it is unfair because highly prejudicial or because it is impossible to meet it by other evidence, in such cases it should be excluded, as other evidence should be excluded in like cases. But it should not be excluded *merely because it is hearsay* except where the party offering it could by reasonable effort and without depending on sources controlled by the opposite party have offered instead the declarant as a witness in his proper person."

LABOR

Labor and the Anti-Trust Laws, by Harry Shulman, in 34 Illinois Law Rev. 769. (March, 1940.)

The author and Thurman Arnold were formerly at least colleagues on the Yale law faculty and as far as known there is nothing conservative about either of them. But Professor Shulman travelled to Northwestern University and delivered a blast at Mr. Arnold's anti-trust program. The promise not to prosecute labor unions for conduct that has met the approval of even the dissenting judges of the Supreme Court in previous decisions is not liberal enough. Objection is expressed to the policy of prosecuting restraints of trade which (1) prevent the use of cheaper material, improved equipment, or more efficient methods, (2) compel the hiring of useless and unnecessary labor, and (3) destroy an established and legitimate system of collective bargaining. The last mentioned policy is apparently interpreted by the author as the equivalent of jurisdictional disputes. A demand for useless and unnecessary labor "may be but an inartistic and clumsy way of expressing a desire for shorter hours or spreading of employment opportunities." A similar reason may justify resistance to improved equipment or more efficient methods. The Sherman Act should be confined "to its historic objects, combinations of capital and business competition." Apparently if labor participates in such combinations it cannot expect immunity. Most of the proceedings thus far instituted under the Arnold program "involve alleged cooperation between unions and employers to effect restraints of competition among employers." These proceedings are not objectionable, it seems, and no justification is attempted of restraints "designed to enforce illegally fixed prices or systems of graft and extortion."

PROCEDURE

Federal Discovery in Operation, by James A. Pike and John W. Willis, in 7 University of Chicago Law Rev. 297 (Feb., 1940).

The lawyer who predicted that despite the new discovery procedure things would go on much as before, that lawyers would make little use of the discovery rules, and that the courts would not permit a lawyer to pry into his opponent's case, seems to have been a very poor prophet. New things are happening; much use is being made of the rules; and a surprising amount of prying is occurring. The newer philosophy of ascertaining the truth more completely than in the good old days, and of avoiding surprises and games of chance, is receiving much encouragement even though the rules are less than two years old. A large number of cases, over a hundred, under rules 26 to 37 are classified and discussed. A liberal interpretation of the rules is expected, and most of the time the expectation appears to have been met. Some decisions are criticized as lacking in that quality. Some revision is foreseen as experience accumulates. Meantime it is a pleasure to record that the harmful old remark that one cannot conduct a "fishing expedition" in the realm of the law is being very considerably restricted under the new federal procedure. The most significant test of the utility of these particular rules apparently will be this: whether in the long run they shorten and simplify trials.

OFFICERS

Has the President An Inherent Power of Removal of His Non-Executive Appointees? by Arthur Larson, in 16 Tennessee Law Rev. 259. (Mar., 1940)

The Arthur Morgan suit against the TVA, contesting the action of President Roosevelt in removing him, is the basis of this general discussion of the President's removal power. When the article was written the suit was pending on appeal in the sixth circuit. It seems plain that the author disagrees with the district judge who held that Morgan could not recover. Why? (1) It is first assumed that Morgan was a non-executive officer. (2) The TVA statute gives the President no discretionary power to remove the directors. It merely imposes a duty on the President to remove them for a specified cause. But the statute does provide that Congress may remove them. (3) The President's power to remove rests upon the maxim that the power to appoint is the power to remove. (4) But the maxim cannot be rested upon the constitution, and, since the power to remove is the power to control, it is opposed to the dogma of separation of powers. More interesting to one reader, at least, is the latter part of the article where the assumption that Morgan was a non-executive officer is tested. Have you been laboring under the impression that the TVA is predominantly a large business undertaking that is operated by three directors? Professor Larson seems inclined, if indeed he does not definitely commit himself, to the view that the TVA is an "arm" of Congress and, therefore, its directors "are not subject to discretionary removal by the President in any circumstances."

News of the Bar Associations

State Bar of Arizona Meets—Business Session Has Interesting Program—Social Features Make Gathering a Delightful Occasion—Officers Elected

THE annual meeting of the State Bar of Arizona was held on April 26 and 27 amidst the most stupendous and indescribable setting evolved by nature, the Grand Canyon of the Colorado in Arizona. The center of activities was El Tovar Hotel on the brink of the magnificent gorge.

Members in attendance were entertained at luncheon by the members of the bar residing in the northern tier of counties of the state, and the annual banquet was held at the same place in the evening. The business session was held at the Community House just below the rim of the canyon and was honored by the presence of Charles A. Beardsley, president of the American Bar Association, who addressed the meeting on "The Challenge to the Profession," and A. Pratt Kessler, of Salt Lake City, vice chairman of the Junior Bar Conference, who addressed the meeting on "Aims and Objectives of the Junior Bar Conference." Harold W. Schweitzer of the executive council of the Junior Bar Conference for the ninth district was also present. J. Byron McCormick, dean of the College of Law of the University of Arizona, addressed the meeting, his subject being in the nature of humor found in the reported cases. The principal address at the banquet was delivered by Robert Brennan of Los Angeles, his subject being "The Current Responsibility of the Legal Fraternity." Following his scheduled address Mr. Beardsley regaled the diners with a humorous address which might be entitled "The Ponderous Prolixity of Legal Language and Legal Documents." Saturday the 27th was devoted to sight-seeing, various trips having been arranged by the Park management around the park and to the various points of interest on the rim of the Canyon. The Park management did more than its share in making the meeting an enjoyable one. A dance was held at the Community house after the banquet. All in all it was probably the most successful and enjoyable meeting held by Arizona lawyers in many years.

LAWRENCE L. HOWE
President, Arizona State Bar

Officers Elected

The officers elected for the ensuing year are: Lawrence L. Howe of Phoenix, president, E. W. Rice of Globe and John C. Haynes of Tucson, vice presidents, Henry H. Miller of Phoenix, treasurer, and James E. Nelson of Phoenix, secretary.

JAMES E. NELSON,
Secretary.

Florida State Bar Holds Annual Meeting—Important Addresses—Principle of Logan-Walter Bill Approved—New Officers

THE thirty-third annual convention of the Florida State Bar Association was held April 19 and 20, 1940, at the George Washington Hotel, Jacksonville, Florida. Over four hundred members, the largest ever registered, were in attendance at the meetings, the president, D. H. Redfearn of Miami, presiding.

On Friday morning the address of welcome was given by William B. Bond, of the Jacksonville Bar Association, and the response by E. Dixie Beggs, Jr., of Pensacola.

The report of the president stressed the subjects of the various circuit legal institutes held throughout the state and outlined other work done by the Association during the year.

John Dickinson, of St. Petersburg, secretary of the Association, made the report of the Conference of Bar Delegates which was held the day previous.

The president's annual address, entitled "Shadows Over the Legal Profession," was timely and very well received.

Young B. Smith, dean of Columbia University Law School, addressed the Association on "The Work of the Law Revision Commission of New York."

Rules of Court

The Association went on record as favoring the adoption of the new Federal Rules by the Florida courts, and also approving the principles of the Logan-Walter Bill.

Friday noon the Junior Section Luncheon and meeting was held, presided over by W. P. Simmons, Jr., of Tallahassee, president of the Section. At that meeting various committee reports were given. J. Lance Lazonby, of Gainesville, was elected President and Charles C. Howell, Jr., of Jacksonville, was re-elected Secretary of the section.

On Saturday morning an address was delivered by Charles A. Beardsley, President of the American Bar Association, stressing the integrated bar.

David A. Simmons, of Houston, Texas, also addressed the Association. His subject was "The Eternal Conflict Between Reason and Force."

New Officers

Various committee reports were had and at the member luncheon held Saturday noon the following officers were elected: J. Velma Keen, of Tallahassee, president; John Dickinson, of St. Petersburg, secretary-treasurer (re-elected); members of the executive council, E. Dixie Beggs, Jr., Pensacola, Warren L. Jones, Jacksonville, James Whitehurst, Brooksville.

At the banquet on Saturday night, which was held in the Roof Garden at the Mayflower Hotel, Hon. J. Weston Allen, former Attorney General of Massachusetts, gave an interesting and humorous address entitled "Off the Record" or "The Humorous Side of Public Life."

An address was also delivered by Carroll A. Teller, of Chicago, president

J. VELMA KEEN
President, Florida State Bar Association

of the Commercial Law League of America, entitled "State Barrier Laws and Their Effect Upon Our Democracy."

The new officers were then presented and installed.

An interesting entertainment program, arranged by the Jacksonville Bar Association, was enjoyed, which included a golf tournament, fishing trip, tea and cocktail party and dance and a reception tendered by Mrs. Alfred I. duPont on her beautiful estate.

The whole session was most enjoyable and is one that will long be remembered in the annals of the Florida State Bar Association.

JOHN DICKINSON,
Secretary.

Federal Rules Used in Revision of Colorado's Code of Civil Procedure

AT the September, 1938, meeting of the Colorado Bar Association a resolution was passed authorizing the appointment of a committee to revise the Colorado Code of Civil Procedure as far as practicable to the Federal Rules. Following that meeting a committee of seventy-five lawyers, with Philip S. Van Cise of Denver as chairman, was appointed to undertake the work.

Following preliminary conferences with the Supreme Court and initial work in outlining the plan, the committee commenced its meetings early in May, 1939. It divided into sub-committees, to each of which was assigned sections of the Rules or Colorado Code, and these sub-committees in turn reported to the main committee, which met each Monday night. In addition to this a two-day institute on the Rules was held in August. Early in January, 1940, additional meetings were held each Thursday night. The draft came from the printer the latter part of April.

The work of the committee has been published for the use of the Revision Committee alone. This group will spend several weeks in polishing and perfecting the proposed Rules. The re-draft will then be distributed to each lawyer in Colorado and discussions had on the Rules. After that has been done they will be submitted at a meeting of the Colorado Bar Association, and upon its approval will be presented to the Supreme Court of Colorado.

By two special statutes, one passed in 1913 and the other in 1939, the Supreme Court of Colorado has been specifically authorized to prescribe rules of practice and procedure, and forms in connection therewith, in all courts of record. The only limitation on the power of the court is that these shall not permit trial judges to comment on the evidence given on the trial.

The proposed Rules completely merge the Code with the Federal Rules as one complete instrument, consisting of one hundred and twenty Rules. In the main, the Rules were adopted verbatim, but the issuance of summons, method of service, and review by the Supreme Court were changed.

Wyoming

AN integrated bar was established in Wyoming in 1939, when the legislature passed a short act, in effect giving power to the Supreme Court to make rules for the government of the bar. The Court has just mailed out a proposed draft of rules for the opinion of the lawyers of the State. These rules are largely patterned after those of Kentucky, from which State the Wyoming statute was taken.

Association of the Bar of the City of New York

THE Committee on Post-Admission Legal Education of the Association of the Bar has announced a two-year program to include a series of twelve lectures dealing with current developments and new directions in the law. The purpose of the series is to keep the practicing lawyer abreast of the law. Novel and significant cases and legislation of importance to legal practitioners will be selected for study and critical analysis. The cases will be examined to determine to what extent they represent departures from former rules. A study will be made of the implications of such decisions, including their social, economic and commercial aspects and the trends of judicial thought which may be deduced from them. The six lectures in this series to be given during the year 1940-1941 are:

1. October 10, 1940—Constitutional and Administrative Law, including the commerce clause, labor relations and the national and state labor relations acts.
2. November 7, 1940—Torts, including defamation, publications in violation of the Civil Rights Act and injuries to person and property.
3. January 9, 1941—Pleading, practice, procedure and evidence, including appellate practice and procedure in the state courts.
4. February 6, 1941 — Representative stockholders' suits and liability of directors.
5. March 6, 1941—Corporation Law generally and corporate reorganizations.
6. April 3, 1941—Federal Practice and Procedure.

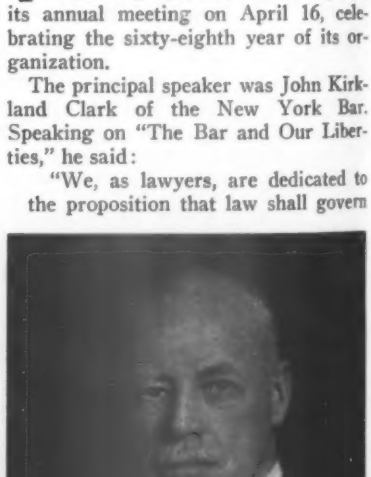
Bernard L. Shientag is chairman of the committee.

Cincinnati

THE Cincinnati Bar Association, which has about 800 members, held its annual meeting on April 16, celebrating the sixty-eighth year of its organization.

The principal speaker was John Kirkland Clark of the New York Bar. Speaking on "The Bar and Our Liberties," he said:

"We, as lawyers, are dedicated to the proposition that law shall govern



HON. J. WESTON ALLEN
of the Boston, Massachusetts, Bar

NELSON COHEN
President, Cincinnati Bar Association

as between individuals, communities, states, and nations. We have striven for generations to build up a law of nations, a body of international law. Over night that body has crumbled. Treaties—the solemn agreements between nations—have been swept aside with utter ruthlessness. Democracies, both recently constituted, and now those existing peacefully for generations, are by infiltration, by treason, and by force, deprived of their inherent freedom. . . .

"Let us highly resolve that in this crisis of our liberties in the life of our nation and the world, we of the bar shall dedicate ourselves to the task of determining the truth, of testing our course in the light of long experience, and then, with the vigor of our minds prepared, go forth to shape intelligent public opinion and direct it into paths which shall preserve and strengthen our liberties and lead the world, by our example of a successful government of the people, by the people, and for the people, into a state where right shall prevail and true freedom shall reign."

Nelson J. Cohen was elected president of the Association; Floyd C. Williams, first vice-president; Joseph S. Graydon, second vice-president; Oliver G. Bailey, third vice-president; Bert H. Long, fourth vice-president; Grauman Marks, secretary; and Philip Hinkle, treasurer.

Columbiana County Bar Association
(East Liverpool, Ohio)

THIS Association, of which Ben L. Bennett is president, has recently made a number of recommendations, including these: That judges appoint as court bailiffs young attorneys just admitted to the bar. They would serve for a year in this capacity and thus obtain first hand knowledge of practice and court procedure in actual use. For more efficient use of the county law library, that a retired attorney be placed in charge of the volumes. A retired attorney would be more familiar with the contents of the library and thus would be of great assistance to attorneys in looking up records and rulings in the volumes, the association said

The association also approved a plan to issue a weekly law bulletin for attorneys of the county containing activities of the profession, listing court rulings and other matters of interest.

A committee also was named to study political indorsements and appointees, to analyze candidates for judicial offices, such as the supreme and appellate courts, and to submit to the public a resume of the candidates' qualifications and recommendations of the bar. The public rarely knows much about these particular candidates and, with information furnished by the association, voters will be able to make an intelligent choice.

BEN L. BENNETT
President, Columbiana County Bar Association

Cleveland

AFTER a year's study by the Association of the menace to society which has been created by the rise in recent years of gangsters and racketeers, the Executive Committee of the Cleveland Bar Association, on April 29, approved a proposed Criminal Conspiracy Act which will be introduced at the next session of the Ohio General Assembly. The creation of such a powerful weapon, to enable state law enforcement agencies to deal more effectively with organized crime and racketeering, was one of the principal planks in the platform of President L. B. Davenport when he was inaugurated, a year ago. The proposed act reads:

"If two or more persons conspire to commit an offense against the State of Ohio, and one or more of such parties do any act to effect the object of the conspiracy each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years, or both."

"Traynor Plan" Disapproved

The Association has asked the Ohio delegation in Congress to vote against the Traynor Plan under which, if adopted, all jurisdiction over income, estate and gift tax cases would be withdrawn from the several Federal District Courts, the Court of Claims, and the Federal Circuit Courts of Appeals. The jurisdiction would be conferred on the Board of Tax Appeals. Taxpayers would have the right to appeal to a single Court of Tax Appeals established in Washington and a discretionary review by the Supreme Court of the United States on petitions for certiorari.

The Tax Committee argued that the proposed plan in practice would actually deprive taxpayers of the right to contest asserted deficiencies by the commissioner of internal revenue for the reason that every protest to a preliminary notice of deficiency must contain the grounds of protest, item by item, the relevant facts, a list of relevant documents, books, papers, etc., and the names and addresses of persons having knowledge of the facts stated in the protest: "Such burdensome requirements would actually deprive all small

Revisor of Statutes, State of Florida

HERBERT A. SPRING
President, Cleveland Bar Association

taxpayers of a right to protest because of the great expense involved in filing such a protest," the committee declared.

New Officers

H. A. Spring was elected President of the Association at the annual meeting on May 7. Governor John W. Bricker of Ohio was the guest of the Association. He spoke on the subject "Politics and the Legal Profession." Other new officers elected and installed were Marcellus DeVaughn, vice president, and Herman H. David, treasurer. New members of the executive committee for three-year terms are Jerome N. Curtis, Raymond F. Dacek, Leonard H. Davis, Isador Grossman, Harry E. Smoyer, and Howard H. Webster. More than 300 members of the Bar attended the annual meeting.

Mr. Spring, in his inaugural talk, proposed the elimination of the six-weeks' terms in the Judiciary, the elimination of the party primary for the nomination of judges, and a study and consideration of the delinquent tax situation in Cuyahoga County, which is retarding the sale of vacant property by reason of the fact that delinquencies for taxes and assessments in hundreds of instances are greater than the value of the property.

New President Outlines Program

Among other proposals brought forth by Mr. Spring were:

1. Advertising by the Association to advise the public to employ counsel where legal matters are involved.

2. Permanent home for the Association and the establishment of a library therein.

3. Pushing the enactment of the proposed General Conspiracy Statute which was prepared and sponsored by the Association for the purpose of giving prosecuting authorities an effective weapon to deal with organized crime.

4. Co-operation with the Common Pleas Court in preparing a standardization of jury charges.

JOSEPH D. STECHER
of the Toledo, Ohio, Bar
Assistant Secretary, American Bar Association

Mr. Davenport, who retired after twelve months' notable service, installed the new officers. He thanked the executive committee, chairmen and members of all committees and the Bar generally for cooperation and support during the year.

TOLEDO

George C. Bryce, long active in affairs of the Toledo Bar Association, will be its next president, having received the nomination for that office on May 11. He will succeed Richard D. Logan. Joseph D. Stecher was nominated vice president and George N. Fell, for many years treasurer of the association, again this year was the sole nominee for that office.